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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NORTHWEST POWER PRODUCTS, INC.,
Plaintiff-Petitioner

v.

OMARK INDUSTRIES, INC., BOB WOOTEN, and BOSCO FASTENING SERVICE CENTER, INC.,
Defendants-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court Of The United States:

Petitioner, Northwest Power Products, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 10, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in ____F.2d____, C.C.H. 1978-2 Trade Cases, ¶ 62,142. The opinion of the district court is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1978. A timely filed petition for rehearing and petition for rehearing en banc was denied on August 24, 1978, and this petition is filed within ninety days of that date. Jurisdiction is invoked under 28 U.S.C. 1245(1).

QUESTIONS PRESENTED

1. Should the doctrine of *Albert Pick-Barth v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932) and its progeny, that a conspiracy to eliminate a competitor by unfair means is a *per se* violation of Sec. 1 of the Sherman Act, be repudiated even though it has been followed by the First and Tenth Circuit Courts of Appeals and other courts for over forty-five years and has never been rejected previously by any appellate court?

2. Should the *Pick-Barth* doctrine be so restricted that a conspiracy to eliminate a competitor by unfair means will violate the antitrust laws only under rule of reason concepts and only if a defendant firm has substantial market power approaching that of monopoly and can gain an increment of monopoly through its unfair competition?

   (a) Are such restrictions justified by reasoning that absent market impact comparable to that forbidden by the law of mergers, the interests protected by the antitrust laws never arise?

   (b) Is there any validity to a conclusion that if a defendant can achieve the desired result of eliminating a competitor by lawful merger, elimination

of that competitor by unfair competition will not give rise to an antitrust violation?

   (c) Are the antitrust laws and unfair competition laws in "general conflict?"

3. Do the facts in this case raise an issue of unreasonable restraint of trade in violation of Sec. 1 of the Sherman Act?

STATUTE INVOLVED

The statutory provisions involved are Sec. 1 of the Sherman Act, 15 U.S.C. Sec. 1, and Sec. 4 of the Clayton Act, 15 U.S.C. Sec. 15, which provide in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent. . . ."

STATEMENT OF THE CASE

Background and Relationship of Parties

Raymond L. McElroy, sole owner and president of Northwest,[1] went to work for Omark,[2] a manufacturer of powder actuated tools and products, as an employee in 1961. He subsequently formed Northwest, which became

1. Plaintiff-Petitioner.
2. Defendant-Respondent.

the Omark distributor in the Dallas-Fort Worth area in 1967. Wooten[3] was employed by both Omark and Northwest at pertinent times, and was sales manager for Northwest immediately prior to its termination by Omark. He became sales manager for Bosco's[4] powder actuated tool products sales shortly after being fired by Northwest and prior to receipt of termination notice by Northwest. Crowder, Whitaker and May[5] were all employees of Northwest at the time it was terminated, and immediately became employees of Bosco. Bosco is a supply company furnishing various products to the construction industry in the Dallas-Fort Worth area. Prior to becoming the Omark distributor, Bosco sold powder actuated tool products "over the counter." Afterwards, Bosco instituted a "field sales" program using the former Northwest sales force.

The Market

The case is concerned with the market for powder actuated fastening tools and products in the Dallas-Fort Worth metropolitan area. At various times, Nelson, Ramset, Speed Fasteners, Ammo Tools, Greenly, Diamond, Uniset, Pyramid, Bostitch, and Hilti also have sold products in the "PAT" line of construction products in the Dallas-Fort Worth market. (App. 165-168.) At the time of its termination as an Omark distributor, McElroy considered Northwest to be the dominant factor in the Dallas-Fort Worth market, with a market penetration of forty (40%) percent. (App. 174.) Mr. George R. Witten,

3. Defendant-Respondent.
4. Defendant-Respondent.
5. Alleged co-conspirators.

marketing expert, attributed a somewhat smaller market share, i.e., 18-20% to Northwest. (App. 149, 433.) There are nine national manufacturers of "PAT" products, all of whom are represented in the Dallas-Fort Worth market. Omark ranks number two nationally with about 25% of the market. (App. 337-346.) It also ranks number two in the Dallas-Fort Worth market. Mr. Crispe, Omark representative stated that Omark's market study indicated that Hilti led the Dallas-Fort Worth market with 35%, and the balance of the market (after exclusion of Hilti's and Omark's shares), i.e., less than 50%, was divided among the remaining competitors. (App. 344-346.)

Prior to termination of Northwest, the only Omark distributors in the Dallas-Fort Worth market were Northwest and Mac McLeroy Fasteners of Garland, Texas. (Depo. McElroy, 110.) Northwest purchased about $4.00 of product to every $1.00 by McLeroy Fasteners. (App. 175-177.) Another estimate is that Northwest purchased $20,000 a month in Omark products and McLeroy Fasteners, $1,000 a month. (App. 370.) At the time of the acts complained of by Northwest, about 2/3rds of Omark's total business in the Dallas-Fort Worth market was in the powder actuated tool line. (App. 178.) McLeroy Fasteners was never a significant factor in the Dallas-Fort Worth fastening market. (App. 179.)

Northwest has continued in the market since the attempt to eliminate it, but on a considerably restricted basis. It sells powder fastening products manufactured by Ramset and Diamond, and handles a line of insulation welding systems. Northwest also handles certain "outside" lines of electric power tools. The products Northwest handles are competitive with comparable

Omark products. (App. 180-183.) Northwest's share of the market, however, has been reduced drastically. It is now less than 2% and decreasing. Northwest's loss was Bosco's gain, for Bosco jumped to well over 10% of the market almost immediately after the culmination of the conspiracy. (App. 149, 433.) During 1973, Northwest's sales of PAT products were $201,674.00. In 1974, after being terminated by Omark in March, sales dropped to $98,788.00. In 1975, sales declined to $41,141.00 and in 1976, they dropped to $30,503.00.

Pre-Conspiracy Competition by Omark and Bosco

Shortly after Northwest became an Omark distributor, Bill Wright, North America Sales Manager for Omark, under the direction of Jerry Crispe, directed Omark sales personnel to contact existing customers of Northwest for the purpose of selling to them on a direct basis. Omark thus competed directly with Northwest, its appointed distributor. At various times Omark employed Don Sullivan, Bob Wooten, Rich McKenzie, Dwayne Higgins, and Pat Murphrey to sell Omark products directly to Northwest's customers in competition with Northwest. (App. 27-31.) This conduct continued unabated (and over the protest of Northwest) until Northwest was terminated as an Omark distributor. (App. 151, 184-189.)

Bosco was also a competitor in the market. Prior to the efforts to eliminate Northwest as a competitor, Bosco made "over-the-counter" sales of powder actuated tool products from both its Dallas and Fort Worth branches, though it contended that sales of the products were relatively small in the year preceding March, 1974. (App.

38-39.) However, after becoming an Omark distributor, Bosco instituted a "field" sales program (using the Northwest sales force), and its share of the market jumped to 11.5% in 1974. (App. 149.)

The Conspiracy

In the latter part of 1973, Wooten and Jack Crowder, one of Northwest's salesmen, met with Pat Murphrey, Omark's sales manager, at the North Park Inn in Dallas. The three discussed Northwest's financial condition. Murphrey said he was seeking a new distributor for Omark, and that one of the prospective candidates for the distributorship was Bosco. (App. 263.) It was indicated to Crowder that he would be connected with the new distributor, the desire being to keep the same personnel in the same area with the same product. (App. 263.)

Later, approximately seven to ten days before February 14, 1974, Bill Wright, Omark's North America Sales Manager, telephoned Wooten at Northwest's offices. Wright said that he was coming down to talk to Wooten about Northwest (or McElroy.) Wright said that "we hear Ray (Raymond McElroy) can't supply the merchandise and we'll be down to see you." (App. 382-385.)[6]

Wooten did not tell Mr. McElroy about the call from Wright. (App. 386-388).

6. In truth, Omark could not supply products ordered by Northwest. (App. 249), a fact admitted by Omark's former warehouse manager, Jack Toyer, who said Omark was deficient in its inventory system. Until at least August, 1973, the warehouse in Dallas had a 25% shortage of merchandise at all times, and even in 1974 Omark had a shortage of its prime moving items. (App. 368-369).

Wooten later received a telephone call from Pat Murphrey setting the date that Omark representatives were to be in Dallas for the meeting.[7] Murphrey called Wooten a second time and said "we're coming to talk to you Bob". Again, Mr. McElroy was not told of the call, (App. 392-394), but the salesmen at Northwest and the secretary, Brenda May, were told by Wooten of the proposed meeting and the date it was going to be held. (App. 396). The meeting was held in Dallas at the North Park Inn early during the day of February 14, 1974. Present at the meeting were three Omark representatives—Bill Wright, Bill English, and Pat Murphrey —and Wooten, Northwest's sales manager. English suggested at this meeting that if Wooten did leave Northwest, Omark could set him up as an "agent". (App. 397). Wooten testified that he understood from the conversation that Omark was going to try to buy McElroy out or secure an *additional* distributor. (App. 398-399). The collaborators discussed the fact that the three Omark representatives intended to meet with Mr. McElroy, and Wright told Wooten that he did not want Wooten present at that time. (App. 400).

Later in the afternoon of February 14, 1974, the Omark representatives visited the Northwest offices and conferred with Mr. McElroy. However, despite Wright's admonition, Wooten was present. Wright demanded that Mr. McElroy get out of business and turn Northwest over to Wooten. (App. 248-249). One of the Omark representatives stated "we're here to put Bob Wooten in charge and if you don't Bob Wooten is going to leave,

7. Wooten and Murphrey talked frequently. Before this conversation, numerous calls had been made by Wooten to Murphrey at Murphrey's home in East Texas. (App. 389-391).

and you're going to lose your distributorship". (App. 191). Mrs. McElroy was called into the meeting (because of her interest in Northwest) and the following demands were made:

(a) that the McElroys dissolve the business (Northwest) and get out;

(b) that the McElroys allow Omark to rent the Northwest location, hire the salesmen and process the inventory that was salable;

(c) that the McElroys sell out to another distributor; and

(d) that Mrs. McElroy liquidate her personal assets to fund the business but that Mr. McElroy sever himself from the company and let Wooten run the business with no interference by McElroy other than periodic examination of the financial statement of the company.

(App. 371). In connection with these demands, Wright stated to McElroy: "If you don't accept these recommendations here and Bob does not get to run the company . . . your salesmen are all going to leave and he [Wooten] is going to leave you and you will be out of business". (App. 250). Wooten added emphasis to this declaration by saying: "If I leave the salesmen are leaving with me". (App. 251).

During the meeting Wooten made statements to the Omark representatives to the effect that McElroy owed banks money and that he was bankrupting the company. (App. 226). These statements prompted Bill Wright to say to Mr. McElroy: "You're bankrupt, you're busted". (App. 195). At the conclusion of the meeting, Wright

said to Mr. McElroy, "You will do this. You have heard what we have had to say. You think about it and you report to Pat Murphrey and let us know your decision". (App. 252). Wright added that in the event things could not be worked out "I will probably be getting Pat Murphrey to be looking for more distributorships . . .". (App. 253).

Wright wrote a confidential memorandum concerning the February 14, 1974, meeting which was dated February 18, 1974. In this memorandum (App. 371) Wright made the following statements:

1. "Ray is mentally and physically distressed to the point of paranoia . . . and not capable of administering the needs of the business.
2. "I would like to investigate the legal aspects of terminating Northwest Power as a distributor of Omark products. It would also be necessary to investigate the possible hiring of the two salesmen as direct reps for Omark, and possibly Wooten. Refer Bradley-Massachusetts potential hiring of distributor salesmen.
3. "Pat Murphrey will be talking with the potential distributors during the week of February 18, 1974.
4. "The legal implications are a pain but must be investigated prior to any action that relates to hiring of Northwest personnel.
5. "Ray McElroy is dead! Long live the queen Diana!"

Despite these reprehensible tactics the McElroys refused to capitulate, and exercised their right to stay in

business. Wooten was fired by Mr. McElroy on Monday, February 18, 1974. (App. 255) On the same day, Mr. McElroy talked with Pat Murphrey advising him that instead of deciding to let Wooten run the company he had decided to fire Wooten. Murphrey responded that "You made the right decision under the circumstances and I don't blame you at all, you didn't have any other choice". (App. 257). Murphrey apologized to McElroy about "some of the things" that were said in the 14th meeting stating "things got a little out of hand". (App. 255). Murphrey then said to Mr. McElroy: "We will go ahead and make up the orders that you need. If you need the stuff we'll get things rolling. If you can put the merchandise in, we should be able to get it all straightened out with Bill (Wright). We can get things rolling now". In response to this statement, Mr. McElroy placed an order for $30-$35,000 worth of Omark products. (App. 258). But after the order from Northwest was accepted and billed, Omark terminated Northwest as a distributor and refused to sell any of its products to the plaintiff. (On one occasion, Wright returned an order to Mr. McElroy on which he (Wright) had written "no" across the order. (App. 217).

Addition of Bosco and Execution of the Conspiracy

Within less than two weeks after the abortive attempted takeover of Northwest by Omark and Wooten, the Defendants secured the resignation of all of Northwest's sales and clerical personnel, appropriated Northwest's customer list, and established Bosco as an Omark distributor, using Wooten and the conspirator sales and clerical personnel and Northwest's customer list to go into direct competition with Northwest. (App. 27-31).

On February 18, 1974, Northwest salesmen Whitaker and Crowder, and Secretary May, and sales manager Wooten all knew that they were going to go to work for Bosco. (App. 209). Wooten was responsible for taking the company employees to Bosco. (App. 239). While both were employed by Northwest, Wooten had discussed with Crowder the proposition of Crowder joining him in another distributorship to sell power fastening products or Omark products (App. 264). After the February 14th meeting, Whitaker, Crowder and Wooten had meetings with Omark representatives and with representatives of Bosco, as a result of which they all went to work for Bosco. Crowder was offered a job with Bosco while he was still in the employ of Northwest. Crowder left Northwest's payroll around the 13th of March, and went to work for Bosco on the 15th of March. Wooten, already employed by Bosco, made the offer of employment to Crowder. (App. 269-270). Whitaker terminated his employment with Northwest on March 23, 1974, and went to work for Bosco on the 26th of March. Wooten contacted Northwest's office manager, Brenda Sue May, and told her that Bosco needed a girl for the Omark line. Although May claims that she was not employed by Northwest at the time she talked to Wooten, she nevertheless had a job interview with Bosco the day she left Northwest. (App. 423-428). She took a typed list of Northwest's customers to Bosco. (App. 219-220). The customer list was unique to Northwest. Not everyone in the construction trade had use for a power fastener. It is of unique value to know who purchases the PAT line as opposed to other fastening products. Information sources, such as Dodge Reports, may list potential customers but tell nothing about the customer's special needs or preferences.

The situation is comparable to a milk route that covers a residential area. It is easy to ascertain the potential customers, but difficult to ascertain, and valuable to know, which of the potential customers desire to have milk delivered to the house. (App. 411-414).

After Wooten was fired, he met with Omark representatives Ben Ball and Pat Murphrey at the North Park Inn. Murphrey, when advised that Wooten had been fired, said "I'll have to call Bill Wright". (App. 403-406). On the 18th or 19th of March, Wooten received a call from Ronald Gibbs of Bosco in which Wooten was asked to discuss the organization of a construction fastening division at Bosco. Gibbs said that Omark had contacted Bosco with regard to taking on the Omark distributorship, and had recommended Wooten. (App. 408-409). Wooten then met with Jim Layden, Jack McCarthy, and Gibbs at Bosco's offices in Dallas. These gentlemen questioned Wooten about how much sales he could produce for them in the Omark line. They said they had been contacted by Kallesen and Murphrey of Omark and were aware that Wooten had been sales manager for Northwest. (App. 410). They also said that Northwest's salesmen Crowder and Whitaker had been to talk to them (Bosco) several days previously. The Bosco representatives asked Wooten to name the customers to whom Northwest was selling, and the dollar volume of sales that had been produced for Northwest. Wooten agreed that "I'll tell you to the best of my recollection", (App. 411) and furnished the information requested.

Northwest was notified by Omark in writing that its Omark distributorship was terminated effective March 20, 1974. This notice was timed to coincide with the place-

ment of the initial order for Omark products by Bosco, as agreed between Omark and Bosco. Bosco was appointed the Omark distributor on March 11, 1974. (App. 304-318; App. 323). Before becoming the Omark distributor, Bosco had marketed power fastening products only as an over-the-counter item. Bosco had not tried to market power fasteners in the field because the products it handled (Diamond and Star) were purchased from distributors. By purchasing from Omark, Bosco received technical assistance from the factory and sales training for its employees. (App. 301-303). But before making the decision to take on the Omark distributorship, Bosco representatives said they talked to a specialist in the field. The specialist was Wooten. The fact that Wooten was available for employment was involved in Bosco's decision to take on the Omark distributorship. (App. 324). Bosco not only employed Wooten, it also employed Northwest's sales force consisting of Crowder and Whitaker, and Northwest's office manager Brenda Sue May on the same day or within the span of a few days in mid-March, 1974. (App. 223).

After Wooten, Whitaker and Crowder and May went to work for Bosco, Omark and Bosco sent letters to all of Northwest's customers advising them that Bosco was the new distributor. Brenda May typed the letters sent out by Bosco. May denied that she used Northwest's customer list for this purpose, but admitted that she received the customer's names and addresses from Wooten and the former Northwest salesmen. (App. 429-430).

The former Northwest salesmen were successful in securing established Northwest customers for Bosco. They switched "numerous" accounts from Northwest to Bosco. (App. 286-288). Some of the large accounts that Bosco

secured in this manner were Ling-Oliver-O'Dwyer Electric Co., Schwarz-Jordan Acoustical, Acoustical Services, and A-to-1 Rentals. (App. 265-266). Before Crowder left the employment of Northwest, he stated to Wooten that he could probably bring with him to Bosco at least half of the Northwest customers "the day he came to work". It worked out just about that way. Fifty (50%) percent of Northwest's customers were switched to Bosco in a short time after Northwest was terminated as an Omark distributor. (App. 267-268).

Disparagement

To aid in securing Northwest's customers and to discredit Northwest, the following misrepresentations and disparaging remarks were made by representatives of Bosco and Omark:

1. In January, 1974, Mr. Bill Matthews of Strawn Equipment Rental was advised by Mr. Pat Murphrey of Omark that Northwest was not able to pay their bills as they came due.

2. In February, 1974, Mr. Jerry Moody, general manager of Moody-Day Company was told by Mr. Murphrey that Murphrey was going to attempt to cancel the distributorship of Northwest because its president, Raymond McElroy, was broke and the Northwest sales manager, Wooten, had told Murphrey that McElroy did not have funds sufficient to buy the Omark products that were needed for sales. Murphrey also told Mr. Moody that McElroy would be bankrupt by the end of the month of February, 1974.

3. During the month of February, 1974, Mr. Carl Hobart of Contractors Equipment & Supply Company

telephoned Mr. McElroy and advised that Murphrey had told him that after talking with Wooten and Wright that Mr. Raymond McElroy was bankrupt. Murphrey wanted to know if Mr. Hobart would like the Omark distributorship if Omark could put Northwest out of business.

4. During the month of February, 1974, Mr. Hank Dannelly, of Pyramid Specialties, advised Mr. McElroy that an Omark representative had told him that Mr. McElroy was bankrupt.

5. In March, 1974, Mr. Mac McLeroy of McLeroy Fasteners was told by Murphrey that Northwest was bankrupt. Bill Wright of Omark advised Mr. McLeroy that Omark had to maintain the market no matter what Mr. Wright had to do.

6. In April, 1974, Mr. Rex Scudder of Ling-Oliver-O'Dwyer Electric was advised by Bob Wooten (who was by this time in Bosco's employ) that Northwest could not supply Omark products in the future because Bosco had taken over the distributorship and Northwest was out of business and bankrupt.

7. During the month of May, 1974, Mr. J. T. Sims of Sims Rental, Cleburne, Texas, was told by Whitaker (of Bosco) that Northwest was no longer in business and that Mr. Sims could no longer buy from Northwest. Also, Whitaker advised Mr. Sims that Sims Rental would be required to buy from Bosco in the future.

8. In June, 1974, Mr. Jack Law of Frank J. Rooney Electric was told by Wooten, Whitaker, and Crowder that Northwest was out of business and could no longer sell to Mr. Law's firm because Bosco had taken over Northwest.

9. In July, 1974, Crowder (of Bosco) represented to Mr. Joe E. Wells of Cadenhead Construction Company, Inc. that Northwest and Bosco were one and the same company.

10. In August, 1974, Mr. Phillip Harris of Harris Acoustical, Fort Worth, was told by Whitaker that Northwest could no longer supply products in the powder actuated tool line. (App. 31-33).

Public Injury and Adverse Effect on Competition

When Bosco was granted the Omark distributorship (March 11, 1974) it was a sales rather than a service oriented company. As a result, it did not inventory or emphasize in its sales policy the full Omark construction line of products as had Northwest. For instance, Bosco did not inventory or emphasize sale of the Nail-King Systems, core drill systems, welding systems, masonry or concrete saws and blades. Bosco did not have the service facilities, expertise, or parts inventory essential to the performance of major service maintenance and repairs on the full line of Omark construction products. Bosco only had the capacity to make emergency field repairs on the smaller and less mechanically complex Omark powder actuated tools. This particular type of equipment required infrequent maintenance.

As an Omark distributor, Northwest had maintained a full maintenance program for the servicing and repair of the full line of Omark construction products. Northwest had the service facilities, expertise, and a large inventory of parts for both out of production as well as current production PATs, as well as the other Omark construction products. Northwest regularly performed

major maintenance and repairs, at its facilities, on the full Omark line.

After Northwest was terminated as an Omark distributor, it continued to make major repairs for owners and users of Omark construction products until its inventory of Omark parts was depleted. Since Omark refused to sell to Northwest after the termination, Northwest was unable to secure the necessary parts with which to continue the full service program. Thereafter, the owners and users of Omark construction products were unable to secure timely, essential, maintenance services and repairs on such products, many of which became inefficient or inoperable for extended periods of time. Thus, the owners and users of the products were inconvenienced and construction projects where the products were employed were delayed while maintenance and repair services were sought from other sources.

Many of the owners and users of Omark construction products replaced such products with competitive products, which caused them increased and unnecessary expenses.

When Bosco was granted the Omark distributorship, it lowered prices on Omark construction products. But Northwest, in order to maintain profitability on severely decreased sales, was required to raise its prices to its remaining customers. Because of brand loyalty and demand in the replacement market, and because Bosco failed to service the market adequately, a number of Northwest's customers continued to deal with Northwest at higher prices. Thus, price, convenience, service, and accessibility of product in the market was detrimentally

affected by the conspiratorial actions of the Defendants-Respondents.

Northwest's sales have dropped from over $200,000 (in 1973) to slightly over $30,000 in 1976. Its market share has decreased from 18-20% to less than 2%, while Bosco's share has climbed to 11.5%. It is apparent that there has been a substantially adverse effect on competition.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit Court of Appeals improperly repudiated the Pick-Barth doctrine and imposed undue and unnecessary strictures upon the cause of action for conspiracy to eliminate competition by unfair means.

(a.) Pick-Barth and its progeny represent more than forty-five years of authority.

The trial court granted summary judgment on Defendants-Respondents' motions, noting in its order and opinion (App. 96) that the Plaintiff-Petitioner, Northwest, relied upon the line of cases emanating from *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932) which holds that a conspiracy to eliminate competition (i.e., a competitor) by unfair means, constitutes an offense under Sec. 1 of the Sherman Act. The trial court made a one sentence analysis of the pertinent cases, saying:

> "In the cases cited by Northwest, a *fellow competitor, a manufacturer,* or *a supplier,* had forced an

> *existing competitor* out of the *total relevant market* through unfair practices." (Emphasis supplied in order to highlight the critical components of the decision.)

The trial court then held that Northwest's evidence did not meet the requirements of the cases because (1) there was no *"substantial existing competitor,"* and (2) Northwest had not been excluded from the *"total relevant market."*

The Fifth Circuit Court of Appeals entirely repudiated the *"Pick-Barth"* doctrine, arguing that the conduct proscribed by *Pick-Barth* did not justify *per se* treatment.

The rejection of the *Pick-Barth* doctrine negates forty-five years of judicial history in which the elements of the offense have become well defined, and the basis for the *per se* rule thoroughly tested.

In the *Albert Pick-Barth* case, the plaintiff alleged that the defendant-corporation, one of a combination of corporations controlled by allied interests which constituted the largest and a dominating factor in the same trade or business as the plaintiff (kitchen equipment) conspired with employees of the plaintiff to deprive plaintiff of its business by pirating plaintiff's customer list, business records and employees, and using their positions to solicit plaintiff's customers for a new competitive business. Though the defendant corporation was alleged to be one of a combination which was a dominant factor in the market, the interrogatories submitted to the jury made only certain inquiries, which established the following facts: (1) the defendants conspired to deprive plaintiff of its business in kitchen equipment and furnishings;

(2) the defendants Albert Pick-Barth Co., Inc., George A. Stuart and John J. McDonald were parties to the conspiracy;[8] (3) a substantial part of the plaintiff's business affected by the conspiracy was of an interstate character; (4) the amount of the interstate business was substantial; (5) the defendants were actuated by a purpose or intent to eliminate or restrict the competition of the plaintiff; (6) the business of the plaintiff in the kitchen furnishings and equipment was a substantial factor in the interstate trade in those commodities in New England; (7) defendants' acquisition of plaintiff's business did not effect an unreasonable restraint of trade; and (8) the amount of plaintiff's damages was $40,000.00.

Even though the jury did not find that the restraint of trade was unreasonable, the court held that a violation had occurred because a conspiracy to eliminate competition by unfair means constitutes a *per se* offense. This holding was based upon a jury finding that the plaintiff was a substantial factor in the market, but the court required no finding that a defendant was a substantial factor in the market. Albert Pick-Barth was alleged to be a member of a combination which was a dominating factor in the market, but so far as legality is concerned, the court attached no significance to this proposition for the court stated (page 102):

> "If a conspiracy is proven, the purpose or intent of which is by unfair means to eliminate a competitor in interstate trade and thereby suppress competition, such a conspiracy, we think, is a violation of Sec. 1 of the Sherman Act. It is the intent and purpose which determines the legality of the conspiracy or combination. . . .

8. Stuart and McDonald were "trusted employees" of the plaintiff.

> ". . . To constitute an offense under Sec. 1 of the Sherman Act it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent."

The court considered that the relevant inquiry from the plaintiff's standpoint was whether the plaintiff was a substantial factor in the market. The relevant inquiry from the defendants' standpoint was whether they had the intent to eliminate competition.[9] Whether the defendant was an "existing" competitor, as opposed to a new competitor, did not control the determination of whether the *per se* violation was committed.[10]

Albert Pick-Barth thus established the principle that a conspiracy to use unfair trade practices to destroy a competitor's business constitutes a *per se* violation of Sec. 1 of the Sherman Act. See "Unfair Competition under the Sherman Act"; *Albert Sauter Co. v. Richard S. Sauter Co.* and the *Pick-Barth* Rule, 59 Iowa Rev. 1194 (1974). Twenty-eight years later the First Circuit again considered the issue.

The case of *Atlantic Heel Co., Inc. v. Allied Heel Co., Inc.*, 284 F.2d 879 (1st Cir. 1960) involved the sufficiency of a complaint which alleged a cause of action similar to that in *Albert Pick-Barth*. Plaintiff, Atlantic Heel Co., alleged that the defendants conspired to destroy its interstate business by (1) establishing a business competitive to that of plaintiff; (2) inducing the superintendent of plaintiff's factory and other key employees to leave plaintiff and work for defendant; (3) disparaging plaintiff and its products by intentionally making false statements relative to plaintiff's financial standing and other matters to established customers of plaintiff with the result that plaintiff's relations with its customers were damaged; (4) soliciting salesmen of plaintiff to cease representing plaintiff and undertake the representation of defendant Allied Heel with the result that plaintiff lost valuable business in the market; (5) falsely representing that a defendant was affiliated with the plaintiff; and (6) acquiring plaintiff's trade secrets.[11] The defendants filed a motion to dismiss for failure of the complaint to state a claim and the district court granted the motion. On appeal, Judge Hartigan wrote an opinion reversing the decision of the district court on the basis of the *Pick-Barth* decision.

9. This is pertinent to the trial court's conclusion that the plaintiff must be totally eliminated from the relevant market, and that the defendant must be a substantial, existing competitor.

10. In fact, a new company was formed to compete with plaintiff as a result of the conspiracy.

With respect to the "significant factor" element, plaintiff was alleged to be a leading concern in the supply of leather and leather board heels, but it was charged that the defendants who conspired to destroy plaintiff in its business established a competitive business in furtherance of the conspiracy. Thus, *Atlantic Heel* dealt with a new competitor, a distinction (from *Albert Pick-Barth*) which the court noted in the following quotation:

> "The complaint there [in Albert Pick-Barth] alleged that the Defendant 'was one of a combination of corporations of similar name and allied interests engaged in the same business as the plaintiff, and

11. In the present case, the allegations, and proof, are very similar.

> constituted the largest and a dominating factor in that trade throughout the United States; . . .' At 149. *Although this allegation is mentioned by the court, it does not seem crucial to the court's analysis of the gravamen of the alleged violation of the anti-trust laws.*"

Accordingly, the court in *Atlantic Heel* concluded:

> "Viewing the conspiracy alleged in the instant case, we believe that the purpose of destroying a competitor by means that are not within the area of fair and honest competition is a purpose that clearly subverts the goal of the Sherman Act. It constitutes an interference with the natural flow of interstate commerce which would exist under conditions of fair and honest rivalry for the buyers' trade. See *Package Closure Corp. v. Seal-Right* [1944-45 Trade Cases, Par. 57,277] 141 F.2d 972-78 (2nd Cir. 1944).
>
> ". . . We believe the complaint in the instant case alleges a conspiracy to destroy a competitor by means so inimical to free and full flow of interstate trade as to constitute a *per se* violation of the Sherman Act. See also, *Cleaves v. Peterboro Basket Co.*, 54 F.2d 101 (D.N.H. 1931)."

In *Perryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F.2d 618 (1965) the Tenth Circuit considered the same issues. There, a long time, trusted employee with full knowledge of the plaintiff's operations, routes and customers, left the plaintiff and became sales manager for the defendant. He had been a supervisor for plaintiff in Western Kansas and Colorado, and directed ten salesmen. Before and after leaving the plaintiff, he tried to persuade other employees of plaintiff to leave the company and come over to defendant. He brought with him

as much of plaintiff's business as was possible. After he left plaintiff's employ, an experienced route salesman quit the plaintiff on a Saturday and began to work for the defendant on the following Monday calling on the same customers in the same territory which he had serviced for the plaintiff. This caused the loss of many accounts by the plaintiff. Two other salesmen also left the plaintiff for defendant. Before leaving plaintiff, one of them told his customers that he was terminating and asked that their accounts be changed to his new employer. Against the background of these facts, the trial court, after a non-jury trial, found that a conspiracy existed to eliminate plaintiff as a competitor by unfair means in violation of Sec. 1 of the Sherman Act. The Tenth Circuit Court of Appeals affirmed, relying on *Atlantic Heel* and *Pick-Barth*, and ratified the principle that a conspiracy to eliminate competition by unfair means is a *per se* violation.

In *Perryton*, the plaintiff and defendant were both rack-jobbers. The plaintiff was a "significant factor" but the relative position of the defendant in the market was not examined. The point appears to have no significance for the court stated:

> "In the case at bar the intent of the conspiracy was to eliminate the competitor predominant in the area by the subversion of its employees. Such elimination destroys rather than maintains competition, is an unreasonable restraint of trade, and violates the statute . . .". (Citing *Albert Pick-Barth* and *Atlantic Heel*).

The Fifth Circuit considered the issue in *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383

F.2d 97 (5th Cir. 1967), cert. den. 390 U.S. 904. There the plaintiff Cherokee sought damages arising out of violations of Secs. 1 and 2 of the Sherman Act. One of the allegations in the complaint included a charge of conspiracy between Bartlett, the sole stockholder of defendant Rotary, and Fisher, the former president of plaintiff, the purpose and eventual result of which was to induce plaintiff's sales force to leave plaintiff and join the defendant. At the trial, plaintiff presented evidence that in 1963 Fisher, president of plaintiff, and four of plaintiff's salesmen left plaintiff and joined the defendant and began selling directly to plaintiff's customers. At the conclusion of the evidence, the trial court directed a verdict for the defendants. The Fifth Circuit reversed and remanded, noting in the course of the opinion:

> "We have thought it necessary to discuss at any length only the agreements between the two corporations, Cherokee and Rotary, *for the evidence clearly developed a case for the jury's determination as to whether Fisher agreed with Rotary and its sole stockholder Bartlett that Fisher and four salesmen would leave Cherokee and join Rotary to promote Rotary's sale of Lytron and to exclude Cherokee from the market.*
>
> *"We hold that lack of proof of public injury, the reason relied on by the district court, did not justify its direction of a verdict for defendants."* (Emphasis supplied).

Though the Court did not cite them, Cherokee's argument on this point was based on *Pick-Barth, Atlantic Heel,* and *Perryton.* (See Appellant's Brief). In holding as it did, the Fifth Circuit accepted, without qualification, Cherokee's argument that the conduct of defendants constituted a *Pick-Barth per se* violation of Sec. 1 of the Sherman Act.

The next case to consider the *per se* violation was *C. Albert Sauter Co. v. Richard S. Sauter Co.,* 368 F. Supp. 501 (E.D. Pa. 1973). The evidence there revealed that in 1971 the defendants, who were employees of plaintiff, conspired to leave the plaintiff to open a competing business and to eliminate plaintiff as a competitor by hiring its key employees. To this end, one of the defendants submitted his resignation effective in one week, and, with another defendant, established the defendant company that was to be directly competitive with plaintiff. While one of the defendants was still in plaintiff's employ, he solicited plaintiff's production coordinator and other employees to join him in the new competitive business. After the plans for the formation of the competing company were announced, plaintiff's former employees intensified efforts to hire away plaintiff's key management, supervisory, production and sales personnel. The effect of such efforts was a loss of a large number of employees within a relatively short period of time. The loss of key personnel and solicitation of plaintiff's customers by former employees caused an immediate and drastic reduction in plaintiff's sales. The trial court found that the evidence was sufficient for the jury to find that defendants solicited, hired, or frightened away plaintiff's key employees for the purpose of eliminating plaintiff as a competitor. The defendants argued that the Sherman Act does not apply to a conspiracy to eliminate competition unless an unreasonable restraint can be shown. The court rejected this contention on the authority of *Perryton, Pick-Barth,* and *Atlantic Heel.*

The *Sauter* case dealt with a new entrant in the market. The defendants were not in competition when the conspiracy originated or when many of the conspiratorial acts were performed. This had no effect upon proof of the *per se* offense, for the court stated:

> "This case falls clearly within the *per se* unreasonable category. The jury found by their answer to interrogatory 1(a) that the defendants 'conspired, agreed or had an understanding to engage in acts of unfair competition with the intent to injure the plaintiff as a competitor by impairing plaintiff's ability to compete in interstate commerce. *In our opinion, nothing is more inimical to free competition.* See *Standard Oil v. U.S.*, 222 U.S. 1 (1911). Where a restraint on trade is *per se* unreasonable, it is unnecessarily for the court to charge on the rule of reason' . . .". (Emphasis supplied).

Thus, in two of the four principal cases to be decided before *Whitten v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), defendants were not existing competitors when the conspiracy was conceived and/or when conspiratorial acts were performed. In the other two cases, the fact that the defendants were existing competitors was not a component element of the cause of action. Therefore, if it were not for certain language in *Whitten* and subsequent district court cases discussing *Whitten* it would appear that in order to establish the *per se* offense, a showing that *plaintiff* is a significant factor in the market is necessary, but defendants' market position is immaterial. However, this proposition was never clearly articulated, and examination of succeeding cases demonstrates the existence of a broader rule.

In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974) the plaintiff Whitten complained of several associated companies competing in the business of manufacturing and merchandising prefabricated metal circulation systems for swimming pools. The defendants, Whitten claimed, had attempted to gain competitive advantages by a variety of unfair means, including false representations. After noting that *Atlantic Heel* and *Pick-Barth* held that efforts of former employees of the plaintiffs to drive the latter out of business by unfair means were illegal *per se* under Sec. 1 of the Sherman Act, the court found the rationale of the cases to be inapplicable to the facts at hand:

> "These were instances, as was *Perryton* and *Sauter* of a sharply focused effort to drain off from a plaintiff his key personnel, confidential information, customer lists and reputation. *In the instant case the focus is not on crippling the organization of a competitor but on beating it in the marketplace. Perhaps the difference is only that between going for the jugular and going to one of the lesser arteries.* But the difference, we feel, is enough.
>
> "Paddock is leaving Whitten as an organization alone; it is concentrating on winning customers. Each customer is his target . . . We cannot say that such attempts, even though unfair and reprehensible, amount to a *per se violation* of the antitrust laws."[12] (Emphasis supplied).

The court in *Whitten* noted all four of the cases previously reviewed without criticizing the results but declined to extend a *per se* antitrust result to what it termed

12. It should be noted that the court only found that necessary elements of the *per se* offense were absent. The opinion does not suggest "rule of reason" requirements.

"garden-variety business torts", i.e., ordinary unfair competition. This holding is summarized in the following quotation:

> "Insofar as *Pick-Barth* and *Atlantic Heel* may be said to stand for the broad proposition that unfair competitive practices accompanied by an intent to hurt a competitor constitutes a *per se* violation of the antitrust laws, we do not now accept their teachings. We do not feel it necessary to criticize the results on the fact situations there presented—*an effort by a defendant which was a significant factor in the market to eliminate a competitor.*" (Emphasis supplied).

The principles laid down in the preceding cases were not eroded. The court simply made it clear that for the *per se* violation of conspiracy to eliminate competition by unfair means to exist, the elements of (1) intent or purpose to eliminate a competitor and (2) "significant factor in the market" must be established. The interesting aspect is that the court speaks in terms of an effort "by a defendant which was a significant factor in the market". The language appears to be inadvertent, for it represents an effort to synthesize "the results on the fact situations there presented [in *Pick-Barth* and *Atlantic Heel*]. *Pick-Barth* did not require a finding as to defendants' market position. *Atlantic Heel,* which dealt with a *new* competitor-defendant rather than an existing competitor-defendant, places no importance on defendants' market position. Therefore, precise analysis of the meaning of this language in *Whitten* is difficult. It cannot be said that *Whitten* changes *Pick-Barth* or *Atlantic Heel* (which were concerned with plaintiff's market position) for it expressly ratifies them. The definite implication is that a

finding that a defendant is a substantial or significant factor in a market is also sufficient to satisfy this element of the test for the *per se* violation. This is entirely logical. The suppression of a new or relatively insignificant competitor (plaintiff) by an existing competitor (defendant) which is a significant factor in the market is indistinguishable from a situation where a plaintiff which is a significant factor in the market is injured by a new competitor (defendant), which conspires to eliminate the plaintiff. Suppression of competition is just as inimical to free trade as its elimination.[13] As pointed out in the *Albert-Pick-Barth* case ". . . it must be held that any combination the intent of which is to suppress competition in interstate commerce is unreasonable, and, if put into effect, may be said unduly to obstruct trade."

The *Pick-Barth* doctrine is reaffirmed and the conclusion that "significant factor" may be either plaintiff or defendant is supported by four district court cases decided since *Whitten.*

In *Tower Tire & Auto Center v. Atlantic Richfield,* 392 F.Supp. 1098 (S.D.Tex. 1975) the plaintiff asserted that a key employee resigned and became owner and president of a new competitor. It was alleged that the new competitor conspired with the manufacturer which franchised the plaintiff to hire away plaintiff's key employees and used discriminatory practices to favor the new competitor. In its memorandum opinion denying

13. In fact, suppression or elimination of competition from a market is illegal, for it is unreasonable *per se* to foreclose competitors from any substantial market. *U.S. v. Maryland & Virginia Milk Producers Ass'n,* 179 F.2d 426 (U.S. App. D.C. 1949), *cert. den.,* 338 U.S. 831; *Northern Pacific Railway v. U.S.,* 356 U.S. 1 (1958); *Fashion Originators Guild v. Federal Trade Commission,* 312 U.S. 457 (1941); and *International Salt Co. v. U.S.,* 332 U.S. 392 (1947).

defendant's motion for summary judgment the court ratified the principles of *Pick-Barth* as explained[14] by *Whitten:*

> "Accordingly, this court will follow the lead of the Court of Appeals for the First Circuit. The *Pick-Barth* rule must henceforth be applied with great circumspection.
>
> "It will not suffice for plaintiff Tower Tire to show that the defendants agreed merely to harm plaintiff's business nor will it suffice for plaintiff to show that the alleged conspiracy was calculated to cause a substantial decline in the ability of the existing competitor to compete as plaintiff has urged. To succeed in its alleged cause of action, plaintiff must obtain a fact finding that the intent of the defendant was effectively to eliminate plaintiff from the relevant market . . .".

In the section of the opinion entitled "The Fourth Element: Market Power" the court made an astute analysis of the "significant factor" element:

> "*Whitten* not only contributed to the conclusion that the requisite intent under *Pick-Barth* must be one presenting a strong threat to competition without any meaningful possibility of being reasonable under the circumstances. The opinion in *Whitten* also distinguished *Pick-Barth* and *Atlantic Heel* in a way which encouraged this court to inquire whether a fourth essential element must be added to plaintiff Tower Tire's cause of action. The *Whitten* court indicated that each of its earlier decisions involved 'a defendant which was a significant factor in the market'. *Whitten, supra,* 508 F.2d at 562. This

14. *Whitten* actually constitutes an explanation of *Pick-Barth* and *Atlantic Heel* rather than a modification of those decisions; when carefully analyzed, it does not appear that *Whitten* made any change in or added any new requirement to the *Pick-Barth* principles.

> statement by the Court of Appeals prompted this Court to request the parties now before it to state whether plaintiff's cause of action did not include an additional element. Not surprisingly, the defendants agreed that the above quoted comment indicated that a fourth element concerning the market power of the defendants must be included. Plaintiff disagreed but contended that this element could be established easily in this case.
>
> "Plaintiff's basic objection to adding a fourth element to its cause of action is that in only one case in this field—*Pick-Barth*—was the defendant a significant factor in the market.[15] Plaintiff protests the illogic of requiring proof that the plaintiff in a *Pick-Barth* case was a significant factor in the relevant market. Tower Tire contends that the monopolistic tendency of a conspiracy to employ unfair trade practices to destroy a competitor conceivably could vary according to the market power of the conspirators, but never according to the market power of the 'victim'.
>
> "The difficulties which surround the employment of a market power or market share test in other areas of *per se* violations caution against any unnecessary decisions or even comments on the subject at this time. *c.f. Fortner Enterprises, Inc. v. United States Steel Corp.*, [1969 Trade Cases, Par. 72,757], 394 U.S. 495, 509 (1969) (dissenting opinion of White, Justice); *United States v. First National Bank & Trust Co. of Lexington,* [1964 Trade Cases, Par. 71,072] 376 U.S. 665, 673 (1964) (dissenting opinion of Harlan, Justice). It may be that the facts of this case will require no refinement of the standard identified by the *Whitten* court. This court

15. "In so contending, plaintiff directly contradicts the crucial statement in *Whitten*. In fact, it is only by implication that the opinion in *Atlantic Heel* anywhere reveals that the defendant was a significant factor in the market."

> notes simply that the participation of defendant Arco in the alleged conspiracy may, by itself, put an end to any doubt as to the significance of the defedants in the market. Arco's role in the TBA distribution in question may be the functional equivalent of the 'unique attractiveness' of the tying product in *Fortner, supra,* 394 U.S. at 499, or the market shares of the merging banks in *Lexington, supra,* 376 U.S. at 668-69."

Thus, the court recognizes that either plaintiff or defendant *may* be the significant factor, but shies away from any more definite qualification of market power.[16]

In *Southland Reship Inc. v. Leslie Flegel, et al,* 401 F. Supp. 339 (N.D. Ga. 1975) the court concluded that a *per se* analysis is applicable when there exists a conspiracy among those who have *purpose, power* or *effect* of completely eliminating a competitor. Southland dealt with a new competitor, i.e., former employees of a wholesale distributor of paperback books, magazines, and periodicals who established a new company financed by a competitor of the former employer. However, the court's analysis does nothing to resolve any confusion arising from the dictum in *Whitten* characterizing *Pick-Barth* and *Atlantic Heel* as dealing with efforts by defendants who were significant factors in the respective markets. At one point, the court states:

> "In short, the evidence in this case will not support either of the two predicates necessary to set the *Perryton* principles in operation (1) a significant

16. The Court does inject a new dimension by suggesting that Arco, the supplier, may be the sifinificant factor in the market. Arco's position in this regard is the same as Omark's, a point examined *infra.*

> existing competitor on the one hand seeking (2) to completely eliminate the complaining plaintiff on the other."

At another point, the court says that there must be a conspiracy the purpose or effect or both being to completely eliminate a competitor, and:

> ". . . As pointed out above, the First Circuit has held, additionally, that *one of the competitors* must be a 'significant factor in the market'." (Emphasis supplied).

Thus, the court in *Southland Reship* confuses the issue (as did the trial court in the present case) by shifting the required "significant factor" from "one of the competitors" to the "competitor seeking to eliminate the plaintiff".

In *Associated Radio Service Co. v. Page Airways, Inc.,* 414 F. Supp. 1088 (N.D. Tex. 1976), Judge Porter reaffirmed Pick-Barth-Whitten principles, but erroneously concluded that Judge Noel, in *Tower Tire,* "required that the defendant be shown to be a significant factor in the market". As noted above, Judge Noel came to no definite conclusion, but indicated that the significant factor might be the plaintiff, or a competitor-defendant, or a franchisor-supplier.

Snyder Champaign-Urban A Motor Lodge, Etc. v. Howard Johnsons Motor Lodge, Inc., Howard Johnson Co., Etc., 1976 Trade Cases, ¶ 6,142 (U.S.D.C. S.D. Ill. 1976) also recognizes the basic cause of action here asserted in the context of direct competition by a franchisor (Howard Johnsons) against a franchisee (Snyder).

The court overruled the motion for summary judgment stating that although plaintiff's case appeared weak on the element of intent to eliminate competition, intent is a question of fact and plaintiff was entitled to his day in court. The court also characterized *Whitten* as adding a "rule of reason" "with a consideration of the effect of a defendant's conduct on some significant part of the market." Though the "rule of reason" observation is inapt,[17] it is an accurate observation that the effect of the defendants' conduct on some significant part of the market is the proper focus of inquiry.[18]

In summary, the elements of the *per se* violation of conspiracy to eliminate a competitor by unfair means are:

(1) an agreement, combination or conspiracy;[19]

(2) the use of unfair methods of competition as a part thereof;

(3) the specific intent to eliminate the plaintiff as a competitor; and

17. This appears to be "loose" language for the matter under consideration was the proper elements of the *per se* offense.

18. The court also says that *Tower Tire* discusses a fourth element of the *per se* offense, i.e., market power of the defendant. This, of course, is not accurately descriptive of *Tower Tire*, as noted above. The point was of no particular importance in *Snyder v. Howard Johnsons*, because the court, in effect, took judicial notice that Howard Johnsons (like Arco in *Tower Tire*) is a significant factor in the market.

19. Since the *per se* offense is the conspiracy to eliminate competition by unfair means, obviously one of the conspirators must be a "competitor." But the competitor-defendant need not have been an existing or pre-existing competitor, for, as the cases hold, he may be a "new competitor", i.e., a competitor born of the conspiratorial design.

(4) at least one of the competitors (parties) is a significant factor in the market.[20]

(b) Neither the trial court nor the appellate court has advanced a valid reason for distinguishing or repudiating the Pick-Barth cause of action.

The basis for the trial court's granting of summary judgment disintegrates in the light of analysis of the cases. The conclusion that plaintiff's cause of action failed because a defendant was not a "substantial existing competitor" is erroneous. As noted, several of the pertinent cases did not even deal with defendants who were competitors when the conspiracy was conceived and/or when conspiratorial acts were performed. In the cases preceding *Whitten* the market position of the plaintiff as a "significant factor" appeared to be of importance, but no significance was attached to the market position of the defendants. Obviously, the significant factor may be either the plaintiff or the defendant (or a conspirator). It was observed in *Woods Exploration and Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971) that "relevant market" is simply a shorthand phrase used to describe "the arena within which the strength of competitive forces is measured." The logic of this observation is applicable to the present case. What is truly in issue is a market share at the center of the controversy which is substantial enough to be significant-whether it be the share enjoyed by the plaintiff

20. As demonstrated by the discussion above, either one of the defendants (or conspirators) or the plaintiff, may be the "substantial" or "significant" factor.

which the defendants seek to appropriate through unfair means, or the share which gives the defendants a base from which to conduct efforts to eliminate or suppress a competitor.

It is also unnecessary to prove that Northwest was totally eliminated from the relevant market. There is no indication in the *Pick-Barth* case that Plaintiff was eliminated from the market. The indication is to the contrary in *Atlantic-Heel* and *Perryton*. Neither *Whitten, Southland Reship* or *Associated Radio* contain any indication that the plaintiff must be eliminated from the market. The *Sauter* case should put the issue to rest. There it is stated:

> "Where the jury finds an intent 'to injure the plaintiff as a competitor by impairing plaintiff's ability to compete in interstate commerce' as it did in this case, it can hardly be argued that the conspiracy is not within the purview of Section 1 of the Sherman Act because the conspiracy was not a complete success, as there are now two companies where there once was one. To hold otherwise would preclude the use of the Act to await the demise of the plaintiff, a result which would clearly be contrary to the intent of Congress."

Northwest and Omark were substantial existing competitors when the conspiracy was conceived and executed, and Bosco became such upon culmination of the conspiracy. It is not necessary to prove that Northwest was totally eliminated from the relevant market. All the elements of the cause of action were demonstrated, and a case was clearly made out under *Pick-Barth, Whitten,* etc. standards.

The rejection of *Pick-Barth* by the Fifth Circuit was based upon equally untenable grounds. The court's opinion (which contains a reasonably complete bibliography of the cases dealing with *Pick-Barth* principles)[21] advances arguments for rejecting *Pick-Barth* which are limited in scope and substance, and based on dubious reasoning.

The Fifth Circuit first observed that the definition of "unfair means" is "so vague that the *Pick-Barth* cases fail to draw the bright line of illegality which is essential if a *per se* rule is to achieve its purpose as a guide to business planning." This argument is particularly hollow. The elements of the *Pick-Barth* offense include both the use of unfair methods of competition and the specific intent to eliminate the plaintiff as a competitor. The suggestion that a defendant needs a more definite "business planning guide" to caution him to avoid this type of conduct indicates an overly permissive tolerance of the "morals of the market place," and misconceives the policy and purpose of the Sherman Act. The policy "unequi-

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21. The cases cited adhering to *Pick-Barth* principles are *Atlantic Heel Co. v. Allied Heel Co., supra; Perryton Wholesale, Inc. v. Pioneer Distributing Co., supra; Albert Sauter Co. v. Richard S. Sauter Co., supra; Snyder v. Howard Johnsons Motor Lodges, Inc.*, 412 F.Supp. 724, 729 (S.D. Ill. 1976); *Tower Tire & Auto Center, Inc. v. Atlantic Richfield Co., supra; Mr. Hanger, Inc. v. Rizzuto*, 410 F.Supp. 1158 (S.D.N.Y. 1975); and *Vogue Instruments Corp v. Lem Instruments Corp.*, 40 F.R.D. 497 (S.D.N.Y. 1966). The cases which the court characterized as rejecting *Pick-Barth per se* rule altogether, are all district court cases and include *Red Wing Carriers v. McKenzie Tank Lines, Inc.*, 443 F.Supp. 639 (N.D.Fla. 1977); *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc.*, 430 F.Supp. 1234 (N.D.Iowa 1977); *Associated Radio Service Co. v. Page Airways, supra; Mar Food Corp. v. Doane*, 405 F.Supp. 730 (N.D.Ill. 1975); *Southland Reship, Inc. v. Flegel, supra*. As shown by the discussion above, it is questionable whether *Associated Radio* and *Southland Reship* should be included in the latter category.

vocally is competition" and the purpose is "preserving free and unfettered competition as the rule of trade." *Northern Pacific, supra. Per se* rules are designed to accomplish the objectives of the Act, not to serve as "checklists."

Just as "no monopolist monopolizes unconscious of what he is doing," every businessman who undertakes the use of unfair means of competition with the specific intent to eliminate a competitor is well aware of what he is doing. There is certainly a "bright line" between what is right and what is wrong. The attempt to eliminate a competitor by unfair means is wrong, and no businessmen could be so unaware of its wrongfulness as to be misled in his "business planning."

The fact that state law may poorly define unfair competitive torts is argument for Pick-Barth application rather than against it. Disparagement, theft of proprietary information, employee "raiding" to cripple an employer's operations, and similar acts are obviously "unfair," whether or not the acts constitute compensable torts under local law. But under the lower court's opinion a plaintiff victimized by a conspiracy to eliminate him as a competitor would be without a remedy if local law proved inadequate.

In the accomplishment of the policy of the antitrust laws, predictable application of the term "unfair competition" does not require that it identify a complete "laundry list" of unfair competitive acts, no more than the antitrust laws are required to identify all possible violations.[22] The antitrust laws are designed to reach

22. Agreements or combinations in restraint of trade may take any form. See discussion, *infra*.

every restraint of trade a businessman's ingenuity might devise, and the term "unfair competition" is flexible enough to include those actions traditionally regarded as unfair, as well as acts hitherto not labeled "unfair" by local law but which are palpably unfair when used with the specific intent to drive a competitor from the market.[23]

(c) The Pick-Barth doctrine is based on sound and time-tested reasoning.

The Fifth Circuit states that *Pick-Barth* jurisprudence reverses the order of development of a *per se* rule which ordinarily grows out of a history of rule of reason cases all arriving at the same verdict. This observation fails to perceive that the *per se* offense of elimination of competition by unfair means is simply a specie of one of the two *per se* violations first recognized by the United States Supreme Court. *International Salt Company, Inc. v. U.S.*, 332 U.S. 392, 1946-47 Trade Cases, ¶57,634 (1947) points out that not only is price fixing unreasonable *per se*, "but also it is unreasonable, *per se*, to foreclose competitors from any substantial market," citing *Fashion Originators Guild v. Federal Trade Commission*, 114 F.2d 80, affirmed, 312 U.S. 457. *Fashion*

23. The contention that "unfair" is too vague and ill-defined to provide a business planning guide is the only substantive attack made on the *Pick-Barth* rule. On a more theoretical, abstract plane the lower court argued that (1) absent market impact comparable to that forbidden by mergers the interests of the antitrust laws never arise; (2) if a defendant can achieve the desired result of eliminating a competitor by lawful merger, elimination of that competitor by unfair competition will not give rise to an antitrust violation; and (3) the antitrust laws and unfair competition laws are in general conflict. These points were advanced in support of the restrictions imposed upon the establishment of a violation in *Pick-Barth* situations under rule of reason concepts, and are discussed *infra*.

Originators, citing the earlier cases of *United States v. American Linseed Oil Co.,* 262 U.S. 371 and *Addyston Pipe and Steel Co. v. United States,* 175 U.S. 211, held that a combination which declined to sell products to retailers who followed a policy of selling garments copied by other manufacturers from designs put out by the combination members was illegal, *per se,* because it had both as its necessary tendency and its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs. This variety of the basic *per se* violation of suppression and elimination of competition from a substantial market became known as the "group boycott" or "concerted refusal to deal" *per se* offense. In the *International Salt* case competition was suppressed or eliminated through a requirement that lessees of International Salt's patented "lixators" and "saltomats" use only International's unpatented salt in the machines. This variety of the basic *per se* offense became known as "tying."

United States v. Maryland & Virginia Milk Producers Association, Inc., 179 F.2d 426, 1948-1949 Trade Cases, ¶ 62,452 (D.C. App. 1949) involved an indictment of an association, its secretary-treasurer, and seven milk distributor corporations for conspiracy to eliminate and suppress competition. The proof revealed that the defendants agreed that the association would not supply milk to any distributor not agreeing to buy his full supply from the association, and to prevent and eliminate competition from distributors not parties to the conspiracy by inducing them not to cut prices, attempting to deprive price cutters of adequate supplies of milk, interfering with the transportation of milk to them,

furnishing milk to the conspirator distributors at reduced rates for use in taking away contract business from price cutters, and driving them out of business. Just as the court in *Fashion Originators* said that fixing or regulating prices, parceling out or limiting production, or bringing about a deterioration in quality does not exhaust the types of conduct banned by the Sherman and Clayton Acts, the court in *U.S. v. Maryland & Virginia* stated that full supply contracts, however legal they may be in other circumstances, are illegal when made for the purpose of eliminating and suppressing competition. The court also said: "Complete monopoly is of course unnecessary; 'the amount of interstate trade . . . affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged . . .'."

Northern Pacific Railway Company v. U. S., 356 U.S. 1, 1958 Trade Cases, ¶ 68,961 (1958) dealt with the practice of imposing "preferential routing" requirements embodied in clauses contained in leases of railroad property. The Supreme Court pointed out that in the *International Salt* case the court ruled that it was " 'unreasonable, *per se,* to foreclose competitors from any substantial market' by tying arrangements." The court also enunciated the basic test for a *per se* violation:

> ". . . There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are pro-

> scribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, . . . division of markets, . . . group boycotts, . . . and tying arrangements . . ."

It has already been seen that two of the specified *per se* violations—tying and group boycotts—are simply different types of the basic *per se* violation of suppression or elimination of competition from a substantial market. A conspiracy to eliminate competition by unfair means is another type of the same basic *per se* violation, for its tendency, purpose, and effect is to eliminate competition. This is implicitly recognized in the following language contained in the *Atlantic Heel* case:

> ". . . We believe that the purpose of destroying a competitor by means that are not within the area of fair and honest competition is a purpose that fairly subverts the goal of the Sherman Act. It constitutes an interference with the natural flow of interstate commerce which would exist under conditions of fair and honest rivalry for the buyer's trade.
>
> ". . . The complaint in the instant case alleges a conspiracy to destroy a competitor by means so inimical to free and full flow of interstate trade as to constitute a *per se* violation of the Sherman Act."

A conspiracy to eliminate competition by unfair means clearly comes within the category of *per se* violations defined by *Northern Pacific*. It has an obvious "pernicious effect on competition," and lacks any redeeming virtue or conceivable business excuse. Therefore, elaborate inquiry as to the precise harm caused is unnecessary.

The *Whitten* case draws the essential distinction between an ordinary unfair competition case and the *per se* offense of elimination of a competitor by unfair means in graphic language:

> "In the instant case the focus is not on crippling the organization of a competitor but on beating it in the marketplace. Perhaps the difference is only between going for the jugular and one of the lesser arteries. But the difference, we feel is enough."

Thus, the *per se* offense is differentiated from an unfair competition tort by unfair acts designed to cripple a business organization with the specific intent of eliminating that organization from the market, i.e., from "competition." The inevitable result is obstruction to commerce and an "adverse effect" on competition—the suppression or elimination of competition.

The fact that the object of the conspiratorial design involved in the particular case is only one competitor does not remove the offense from the *per se* "suppression or elimination of competition" category. It was held in *Klor's, Inc. v. Broadway-Hale Stores,* 359 U.S. 207 (1959) that a practice which interferes with the natural flow of interstate commerce and has a monopolistic tendency should not be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. "Mo-

nopoly can assuredly thrive from the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." And, in *International Salt* the court said:

> "Under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement."

Obviously, if conspiratorial defendants can do what was done to Northwest in this case with impunity, the same can be done to one, or all, of the remaining competitors. The opinion of the Fifth Circuit would require the law to wait until the number of competitors suppressed or eliminated afforded the conspirators a Section 2 monopolistic position before "condemning the direction of the movement."

The cut throat crippling of a business for the specific purpose of eliminating it from competition is wrong and inevitably tends to restrain trade and foster monopoly everytime it occurs. The cases holding the practice illegal without regard to varying and sometimes illusory standards of "rule of reason" should be upheld.

2. The holding that the defendant must possess substantial market power approaching that of monopoly and gain an increment of monopoly through his unfair competition imposes undue and unnecessary restrictions on proof of an offense under rule of reason standards.

In its efforts to redefine the law so as to make it assume "Sherman Act proportions" the Fifth Circuit con-

structed artificial, arbitrary and unrealistic requirements for proof of the offense of elimination of competition by unfair means under the "rule of reason." The court suggests that a violation might exist, but only where a firm with substantial market power, approaching that of a monopoly, uses unfair competition to augment its position by eliminating a rival concern from the market. This reasoning mixes concepts of Sections 1 and 2 Sherman Act violations. Obviously, if an offending firm has market power approaching that of a monopoly, its actions are properly tested under the "attempt to monopolize" portion of Sec. 2 of the Sherman Act. To read this sort of "market power" requirement into the proof of the Sec. 1 violation makes the two sections largely redundant. A plaintiff could not hope to prevail under Sec. 1, unless he was prepared to prove a Sec. 2 violation. Thus, Sec. 1 is substantially eviscerated.

There is absolutely no support for equating proof of an unreasonable restraint with monopoly or near monopoly power. Likewise, there is no support for a holding that an increment of monopoly power must be gained through the offense in order for an unreasonable restraint to occur.

The most famous language concerning the definition of an unreasonable restraint of trade is to be found in Justice Brandeis' opinion in *Chicago Board of Trade v. U. S.*, 246 U.S. 231. Various cases have attempted to give practical dimensions to the *Chicago Board of Trade* opinion. See *William Filenes Sons, Co. v. Fashion Originators Guild,* 90 F.2d 556; *Sandidge v. Rogers,* 167 F.Supp. 553 (S.D. Ind. 1958); *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709; *Martin B. Glauser Dodge*

Co. v. Chrysler Corp., 418 F.Supp. 1009 (U.S.D.C. D.N.J. 1976); *Rogers v. Douglas Tobacco Board*, 266 F.Supp. 636; *Parmalee Transportation Co. v. Keeshin*, 144 F.Supp. 480; *Interborough News Co. v. Curtis Publishing Co.*, 127 F.Supp. 286; and *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). The "public injury" concept has been introduced to confound what *U. S. v. duPont*, 351 U.S. 377, termed the "imprecise rule" (and, according to some authorities, later abandoned.) Certain authorities have indicated that "unreasonable restraint" and the principle that the public rights must be violated before an offense is committed are merely different ways of saying the same thing. *Lynch v. Magnovox*, 94 F.2d 883 (9th Cir. 1938) and *Kestenbaum v. Falstaff*, ____ F.2d____ (5th Cir. 1978). Several types of "public injury" have been defined, see discussion *CCH Trade Regulation Reporter*, Vol. 1, ¶ 650, p. 1291, et seq., and various factors bearing on the determination of "unreasonableness" have been discussed. See *Chicago Board of Trade v. U. S., supra*, and *Summers v. Abraham Lincoln Savings and Loan Association*, 66 F.R.D. 58 (D.C. Pa. 1975). But until now no case has ever suggested that a monopolistic share of the relevant market must be possessed or attained by the defendant before an unreasonable restraint can be established, and that includes the Fifth Circuit's most recent pronouncement on the subject. See, *Kestenbaum v. Falstaff, supra*, and *H & B Equipment Co. v. International Harvester*, ____ F.2d____ (5th Cir. 1978).

There is no justification for treating the offense of elimination of competition by unfair means any differently than any other "unreasonable" restraint (if it must be judged by rule of reason concepts.) The reasons

advanced by the Fifth Circuit for this unprecedented action do not afford such a basis.

(a) The conclusion that in the absence of market impact forbidden by the law of mergers, interests protected by the antitrust laws never arise is unsupportable.

The Fifth Circuit Court reached the conclusion that in the absence of market impact comparable to that which would be forbidden by the law of mergers, a defendant is free to follow a course designed to eliminate competition through unfair actions without running afoul of the antitrust laws. This further confuses and commingles different antitrust principles. Title 15 U.S.C.A. Sec. 18 prevents mergers where, in any line of commerce, the effect may be to substantially lessen competition or tend to create a monopoly. The wording is thus comparable to that used to define Clayton Act, Sec. 3 "incipient" violations. The implication in the Fifth Circuit opinion that a Sec. 1 rule of reason test is used to determine validity of mergers is not warranted. The courts have applied "Section 7" tests which have been judicially developed, and at least one case has predictably suggested a coalesence of Sec. 3 and Sec. 7 tests. See *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957) relying on *Standard Oil Co. v. United States*, 337 U.S. 293 (1949). The Fifth Circuit's approach injects confusion into rule of reason which may pose endless problems, by, in effect, superimposing Sec. 7 and Sec. 3 tests on Sec. 1 tests (which were none too clear at the starting point.) To multiply the confusion, Sec. 2 tests are injected, for the court also argued that only if the defendant can gain an increment of monopoly

through his unfair competition would the additional sanctions of the Sherman Act be appropriately used to deter him. After the significant deviation by way of Sec. 7, this returns the reasoning to its starting point, i.e., that market power of the proportion of Sec. 2 monopoly or attempted monopoly must be vested in the defendant before the defendant's conspiratorial actions designed to eliminate a competitor through unfair competitive means will constitute a violation of Sec. 1. Clearly, Congress never intended such an amalgamated result, and Sec. 1 does not comprehend such a confused burden of proof.

(b) Application of merger tests to rule of reason cases is not justified by the illogical conclusion that if a defendant can achieve the desired result by lawful merger, elimination of a competitor by unfair competition will not give rise to a violation.

To support its monopoly power conclusion, the lower court stated that if a defendant can achieve a desired result either by lawful merger or by engaging in unfair competition, the choice of the unfair competition route alone should not give rise to an antitrust violation. The "desired result" is the elimination of competition or a "competitor." The fact that this might be done in a legal manner, without injury to the eliminated firm, is hardly an argument in support of sanctioning the elimination of competition by unfair means. There is no logical comparison between the two. This argument is no more valid than an argument that a horizontal restriction or a group boycott, which eliminates a competitor, is permissible if the absorption of the eliminated

firm by a defendant firm would not have been prohibited by the law of mergers. The fact that the end result of a trade restraint might have been accomplished lawfully, i.e., in another manner not involving the trade restraint, does not legalize the trade restraint.

(c) The antitrust laws and the laws of unfair competition are not in "general conflict."

The Fifth Circuit opinion states that the *Pick-Barth* doctrine "fails to perceive that the purposes of antitrust law and unfair competition law generally conflict." The court argued that the thrust of antitrust law is to prevent restraints on competition, and makes the remarkable statement that "unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition." To illustrate, the court argued that the law of unfair competition tends to protect a business in the monopoly over the loyalty of its employees and its customer list, while the general purpose of the antitrust law is to promote competition by freeing from monopoly a firm's sources of labor and markets for its products. It is obvious, however, that a firm's "sources of labor" are not the same as the loyalty of a firm's employees, and "markets for its products" is not the same as a firm's customer list. There is no "general conflict" between the purposes of antitrust law and unfair competition law. Both forms of tort grew out of the same basic common law. The law of unfair competition is designed to prevent one merchant from obtaining an unconscionable advantage that might accrue from the performance of an unfair act. Effective enforcement of unfair competition law is no more likely to impose restraints on competition than is effective enforce-

ment of antitrust law. For example, predatory pricing and group boycotts are clearly "unfair" methods of competition which are proscribed by antitrust laws. Policing of these practices has the same basic purpose as proscribing the theft of proprietary information and trade disparagement. Proscription of the latter practices does not impose restraints on competition, as the Fifth Circuit suggests, but instead preserves and promotes competition by preventing unconscionable practices designed to injure a competitor.

In sum, none of the reasons suggested by the Fifth Circuit justify the adoption of the peculiar "rule of reason" rules formulated by the court for special application to the offense of elimination of competition by unfair means.

3. An unreasonable restraint of trade in violation of Sec. 1 of the Sherman Act was shown, under traditional rule of reason tests.

The circumstances surrounding the elimination of Northwest as a distributor and the substitution of Bosco, and the manner in which it was accomplished, are discussed above. The scope of the conspiracy is much broader than a simple dealer substitution. The elimination of Northwest, and the appointment of Bosco was for the purpose of eliminating Northwest as a competitor in the market. The conspiratorial design was accomplished by actions of the type long regarded as legally reprehensible. The jury may well find an unreasonable restraint of trade resulting from these acts, which, for all practical purposes, eliminated Northwest as a competitor and had an adverse effect on both competition and the

consumer. Thus, Northwest is entitled to recovery, even if the proof falls short of meeting the *per se* requirements.

Agreements or combinations in restraint of trade may take any form. Chief Justice Hughes in the case of *Sugar Institute v. United States*, 297 U.S. 553, characterized the Sherman Act as follows:

> "We have said that the Sherman Act as a charter of freedom has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus—in applying its broad prohibitions, each case demands a close scrutiny of its own facts."

Again, in *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958), the Supreme Court said:

> "The Sherman Act is designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions. But even were that premise open to question, the policy unequivocally laid down by the act is competition, and to this end it prohibits 'every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states'."

The famous *Standard Oil* (221 U.S. 1) and *American Tobacco* (221 U.S. 106) cases injected the "rule of reason" into the law in 1911. The "bedrock" language relating to "unreasonable" restraints is to be found in

the 1918 decision of *Chicago Board of Trade v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683. There Justice Bradeis stated:

> ". . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine the question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effects, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, *are all relevant facts.* This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and predict consequences." (Emphasis supplied).

The "rule of reason" has been termed the "imprecise rule." *U.S. v. E. I. Dupont De Nemours & Company,* 351 U.S. 377. Expansion of the concept originated by *Standard Oil* and *American Tobacco* to include the element of "public injury" confounded this "impreciseness". (The "public injury" test for determining unreasonableness of a restraint has now been abandoned by certain jurisdictions). At best, the factual elements of a showing of "public injury" have only been hazily defined. In *William Filene's Sons Co. v. Fashion Originators Guild,* 90 F.2d 556, it is indicated that (1) price control, (2) production control, or (3) deterioration in quality must be shown, the fundamental test being a detriment to the public.

In the often cited district court case of *Sandidge v. Rogers,* 167 F.Supp. 553 (S.D. Indiana 1958) the court stated that whether a conspiracy is unreasonable depends on testing the facts "to ascertain whether the defendant's conduct had detrimental effect on the public". This, the court held, is to be tested by whether such factors as price, quality, quantity, service, convenience, or accessibility are adversely affected.

Illustrating application of the rule of reason in jurisdictions which no longer employ the "public injury" test is *Martin B. Glauser Dodge Co. v. Chrysler Corp.,* 418 F.Supp. 1009 (U.S. D.C., D. N.J. 1976), where the court, after review of the authorities, concluded that ". . . in a private antitrust action the plaintiff is not required to prove an injury to the public as a material element in his case". (Page 1017). The court then stated:

> "It is essential, however, that plaintiff show that the challenged practices adversely affected 'competition in the marketplace'. (Citing authorities)."

The court then held this burden to be satisfied by proof of elimination of intrabrand competition (and cited several authorities in support of the proposition). In this regard, see also *Quality Mercury, Inc. v. Ford Motor Co.,* 542 F.2d 466 (8th Cir. 1976).

In jurisdictions retaining the public injury concept, it is apparent that proof of injury to the consumer demonstrates adverse effect on "competition in the marketplace".

Under the Sherman Act the reasonableness or unreasonableness of a restraint on interstate trade or commerce is a question of fact the solution of which rests upon the conditions obtaining in the particular case. *U. S. v.*

Standard Oil Co., 78 F.Supp. 850, aff'd 69 S.Ct. 1051, 337 U.S. 293, 93 L.Ed. 1371, followed in *Richfield Oil v. U.S.*, 72 S.Ct. 665, 343 U.S. 922, 92 L.Ed. 1334. In the case of *Winn Avenue Warehouse, Inc. v. Winchester Tobacco Co.*, 339 F.2d 277 (6th Cir. 1964) the court states at page 280:

> "Under the rule of reason announced by the Supreme Court in *Standard Oil of New Jersey v. U.S.*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, only an unreasonable restraint of trade is a violation of Section 1 of the Sherman Act. *Whether a restraint is unreasonable or whether there is any restraint is a question of fact. Board of Trade of City of Chicago v. U.S.*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683; *Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825; *Times Picayune Pub. Co. v. U.S.*, 345 U.S. 594, 73 S.Ct. 972, 97 L.Ed. 1277."

Accordingly, in *Bale v. Glasgow Tobacco Board of Trade, Inc.*, 339 F.2d 281 (6th Cir. 1964) a district judge's factual determination that a restrictive practice was an unreasonable restraint of trade was upheld, the court saying:

> "The function of the courts is not to formulate reasonable restraints of trade, but to enjoin the enforcement of those restraints that unreasonably restrain trade. *The scope of this court's review is limited to determining whether the trial judge's findings, including the inferences drawn from undisputed facts, are clearly erroneous.*"

In *American Tobacco Co. v. United States*, 147 F.2d 93 (6th Cir. 1944) the court pointed out that the Sherman Act condemns every means, no matter how

novel, to accomplish the objective of restraining trade. It is not the form of the combination or particular means used, but the results achieved that the statute condemns. The court stated that *the effect of a combination or a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole; acts which, considered singly, may be entirely innocent and absolutely lawful in themselves, may be steps in a (crinminal) conspiracy.*

When these tests are applied to the present case, it is clear that the reprehensible actions of the defendants were such as "may tend to supress or destroy competition" (witness the effect upon Northwest) and adversely affected competition to the injury of the consumer.

Northwest's business has been rendered unprofitable, its sales have been drastically reduced, it is no longer a significant factor in the market, and for all practical purposes, it has been eliminated from the market. This has been tantamount to the elimination of a service organization, for Bosco provides only limited service. The Fifth Circuit court said that "structurally" competition has been increased because there are now two competitors (Bosco and Northwest) where there was just Northwest. But it is apparent that Northwest is no longer a viable competitor, and the reduction in market share from 20% by Northwest to 13% by Bosco and Northwest combined illustrates the deterioration in service and injury to the large number of customers "stuck" with unserviced Omark products. The affidavit of Raymond L. McElroy, App. 151, and the discussion of "public injury and adverse effect on competition" above, demonstrate that as a result of the combined actions of the de-

fendants, customers in the market have been adversely affected from the standpoint of price, convenience, service and accessibility of product. Accordingly, it is clear, that in all events, Northwest is entitled to have submitted to a jury the question of whether there has been an unreasonable restraint of trade resulting from the conspiratorial actions of the defendants.

Sec. 1 of the Sherman Act says that *any* contract or combination or conspiracy in (unreasonable) restraint of trade is a violation. This language cannot be ignored. Where the evidence raises an issue of unreasonable restraint, the case must be submitted to the jury.

CONCLUSION

The general standards regarding granting of summary judgment are applied most strictly in the antitrust context. As the court observed in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

> " . . . We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of even handed justice." 386 U.S. at 473.

For the reasons cited above, Petitioner respectfully submits that the evidence demonstrates a cause of action for

(a) the *per se* violation of conspiracy to eliminate a competitor by unfair means, and

(b) unreasonable restraint of trade in violation of Sec. 1 of the Sherman Act.

Accordingly, the judgment of the trial court granting summary judgment and the judgment of affirmance by the Fifth Circuit Court of Appeals should be reversed and the cause remanded for trial.

Respectfully submitted,

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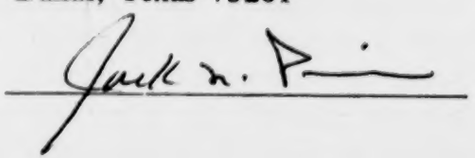
By: 

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing document has been forwarded to the following: Mr. Jerry Buchmeyer, 2300 Republic National Bank Building, Dallas, Texas 75201, attorney for Omark Industries, Inc.; Phillip N. Smith, Mercantile Dallas Building, Dallas, Texas 75201, attorney for Bob Wooten; and Marvin S. Sloman, 3000 One Main Place, Dallas, Texas 75250, attorney for Bosco Fastening Service Center, Inc., by U. S. Mail on this the 16 day of November, 1978.

JACK N. PRICE

APPENDIX

NORTHWEST POWER PRODUCTS, INC.,
Plaintiff-Appellant,

v.

OMARK INDUSTRIES, INC., Bob Wooten, and Bosco Fastening Service Center, Inc.,
Defendants-Appellees.

No. 77-1976.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

July 10, 1978.

Former distributor of powder-actuated tools and supplies brought treble damage action under Sherman Act against supplier, new distributor and its former sales manager. The United States District Court for the Northern District of Texas, Robert M. Hill, J., granted summary judgment for defendants, and plaintiff appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) a conspiracy to eliminate a competitor by unfair means is not, per se, a violation of the Sherman Act and (2) former distributor which held 20% share of market and which was substituted by supplier with another distributor with 11.5% share of market, which failed to show that either supplier or new distributor earned excess profits on business or that market as a whole lacked full service and which was forced to raise prices to compensate for overhead on lower volume failed to show anticompetitive effect of the substitution and so did not establish an antitrust violation under rule of reason.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

RONEY, Circuit Judge:

Omark Industries, Inc. terminated Northwest Power Products, Inc. as a distributor of Omark powder actuated tools (PAT) and supplies. Northwest brought this treble damage action under the Sherman Act, 15 U.S.C.A. § 1, against Omark; the new distributor, Bosco Fastening Service Center, Inc.; and Northwest's former sales manager, Bob Wooten, who led a contingent of Northwest employees who defected to Bosco. Northwest alleges the defendants conspired both to strip it of its distributorship and to deprive it of its customers by tortious and unfair means. The district court granted summary judgment for the defendants.

The plaintiff rests its case on a slender line of decisions beginning with *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552, 52 S.Ct. 503, 76 L.Ed. 1288 (1932), which held somewhat similar conduct to be a *per se* violation of the antitrust laws. Because we reject the *Pick-Barth* teaching and agree with defendants that the holding of *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975), largely controls this case, we affirm the judgment of the district court.

I. *Facts*

[1] On appeal from a grant of summary judgment, the facts are to be viewed in the light most favorable

to the nonmoving party. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Gauck v. Meleski*, 346 F.2d 433, 436 (5th Cir. 1965).

The market relevant here is the distribution and servicing of powder actuated tools and supplies for the construction industry in the Dallas-Fort Worth area. The tools fire nail-type fasteners for holding objects to masonry. In that market, Northwest was number two, with an 18-20 percent share, and ranked ahead of eight smaller distributors. Another Omark distributor, McLeroy Fasteners, accounted for two percent. Bosco, a sizeable retailer of construction supplies, sold some powder actuated tool products, but did not act as a distributor. Its sales at retail amounted to less than one-tenth of one percent of the market. Omark, ranking number two in the nation in the manufacture of PATs with a 25 percent market share, *had engaged in some local distribution, and, at the time of the termination, still sold to national construction firms operating in Dallas. None of the depositions or affidavits offered in response to the motion for summary judgment, however, quantify those sales.*

Omark grew dissatisfied with Northwest, thought its financial footing was unsound, and refused to supply it on other than a C.O.D. basis. Perceiving the problem to be Northwest's president, Raymond McElroy, Omark secretly began negotiations with sales manager Wooten in an attempt to channel its business through an organization Wooten would head. Three Omark representatives then confronted McElroy, and told him that if he did not turn the management of Northwest over to Wooten then Wooten would leave and Omark would terminate Northwest. McElroy refused to comply. He fired Wooten. At

Omark's suggestion, Bosco then hired Wooten to open a new PAT distributorship. Omark refused to supply Northwest further, and entered into a distributorship arrangement with Bosco. Bosco hired away Northwest's two other salesmen and a Northwest secretary, who took with her a valuable customer list.

Northwest, relying on Omark inventory and new PAT supplies furnished by Ramset and Diamond, continued in business. To eliminate Northwest from the market, agents of Omark and Bosco made false and disparaging remarks to Northwest customers. These remarks included statements that Northwest did not have the funds to buy Omark products, that Northwest would shortly be bankrupt, and later that Northwest was out of business, could not supply PAT products, *and was not one and the same as Bosco.*

At the time of summary judgment, Bosco had gained 11.5 percent of the local market, while Northwest's share had plummeted to two percent.

II. *Pick-Barth*

[2] A supplier may switch dealers and conspire with a new dealer to take the place of an established one. Without more, the antitrust laws do not stand in their way. *Burdett Sound, Inc.*, 515 F.2d at 1248-1249.

Plaintiff argues that Northwest distributed brands of PAT other than Omark, that the defendants conspired to use *unfair means* to eliminate Northwest as a competitor, and this action brings the defendants' conduct within the prohibition of the Sherman Act. The types of unfair competition assertedly employed by the defendants include (1) employee disloyalty, (2) misappropriation of

a "trade secret" customer list, and (3) trade disparagement.

The first court to hold that a conspiracy to eliminate a competitor by unfair means violates the Sherman Act was the First Circuit in *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert denied*, 286 U.S. 552, 52 S.Ct. 503, 76 L.Ed. 1288 (1932). The defendant, Pick-Barth, was a dominant factor in the national market for kitchen equipment and utentils. Pick-Barth's trade in the New England states, however, was limited. To break into that market, Pick-Barth hired away the plaintiff's employees and wrongfully obtained its customer list. The First Circuit, reversing a jury verdict that no unreasonable restraint of trade resulted, held that the intent to eliminate a competitor by unlawful or unfair competition violated the Act. A later case before the same court characterized the offense as *per se*. *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960) (two judges concurring in result only). In its most recent consideration, the First Circuit limited *Pick-Barth* and *Allied Heel* to what it perceived to be their facts, but did not overrule them. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974).

One other circuit court has recognized a *Pick-Barth* cause of action under the Sherman Act, *Perryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945, 86 S.Ct. 1202, 16 L.Ed.2d 208 (1966). That decision did not use *per se* language. One district court, however, has expressly applied a *per se* test, holding no anticompetitive effect need be shown. *Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F.Supp. 501, 512-514 (E.D.Pa. 1973) (verdict

for plaintiff). Other courts have allowed trial of issues framed along the lines of the *Pick-Barth* theory of liability. *See Snyder v. Howard Johnson's Motor Lodges, Inc.*, 412 F.Supp. 724, 729 (S.D. Ill. 1976) (denied summary judgment); *Tower Tire & Auto Center, Inc. v. Atlantic Richfield Co.*, 392 F.Supp. 1098 (S.D. Tex. 1975) (denied summary judgment); *Mr. Hanger, Inc. v. Rizzuto*, 410 F.Supp. 1158 (S.D. N.Y. 1975) (denied motion to dismiss for lack of jurisdiction); *Vogue Instrument Corp. v. Lem Instruments Corp.*, 40 F.R.D. 497 (S.D. N.Y. 1966) (denied summary judgment).

Our own decisions have never expressly considered *Pick-Barth*. *See Southland Reship, Inc. v. Flegel*, 534 F.2d 639, 643 (5th Cir. 1973). In *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383 F.2d 97 (5th Cir. 1967), *cert. denied*, 390 U.S. 904, 88 S.Ct. 816, 19 L.Ed.2d 870 (1968), we concluded that a case for the jury existed when a supplier enticed plaintiff distributor's employees into forming a new distribution organization for the supplier who then raised his prices to the plaintiff. In *Burdett Sound, Inc.*, however, without mentioning *Cherokee*, we rejected the theory that an allegation of unfair trade practices in the distributor substitution context could resist a motion for summary judgment, reasoning that "attempts to drive another competitor out of business" did not apply to substitutions. 515 F.2d at 1248. *See also Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 97 S.Ct. 88, 50 L.Ed2d 92 (1976); *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 166 (1963). By examination of the original *Cherokee Laboratories, Inc.* and *Burdett Sound, Inc. briefs*, we have

ascertained that in both cases the plaintiff relied on cases from the *Pick-Barth* line, but neither published opinion cites them.

This case is different from *Burdett Sound, Inc.* in some respects. Here the acts of unfair competition were not only designed to switch customers from one distributor to another, but they were also calculated to protect Omark from the new Ramset and Diamond brands carried by Northwest. *Burdett Sound, Inc.* only addressed conduct designed to lessen intrabrand competition. Here interbrand competition is also at stake, and interbrand competition is the "primary concern of antitrust law." *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 52 n.19, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

Cherokee Laboratories, Inc. was also an interbrand case. While that provides some basis for distinguishing the two cases, in view of this Court's prior failure to address squarely the *per se* issue raised by the plaintiff, we will confront that question first, and then, rejecting the *per se* rule, turn to consideration of whether the facts here can establish an antitrust violation under the rule of reason.

III. *A Per Se Rule?*

The brief language of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . ." 15 U.S.C.A. § 1. The courts have looked to the "rule of reason" in giving substance to that terse wording, and examined the purpose, market power, and anticompetitive effect of the restraints before them. *Chicago Board*

of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918); *Union Circulation Co v. FTC,* 241 F.2d 652, 656 (2d Cir. 1957). Rule of reason analysis, however, is time-consuming and gives little guidance to businessmen engaged in planning a new transaction. To overcome those difficulties, the Supreme Court has preferred to map out areas of *"per se"* illegality, business practices which have such a "pernicious effect on competition and lack . . . any redeeming virtue" that they are condemned without inquiry into the nature of their impact on a particular market. *Northern Pacific Ry. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958); see *Continental T.V., Inc.,* 433 U.S. at 50, 97 S.Ct. 2549 (1977).

The decisions applying the *Pick-Barth* rule as a *per se* offense have not closely analyzed the question of whether a conspiracy to eliminate a competitor by unfair means is the kind of conduct so contrary to the purposes of the Sherman Act that it deserves *per se* treatment. *See Atlantic Heel Co.,* 284 F.2d at 884. The conclusion is stated rather than reached. The usual assumption is that a *per se* rule would grow out of a history of rule of reason cases all arriving at the same verdict. *United States v. Topco Associates, Inc.,* 405 U.S. 596, 607-608, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). *Kentucky Fried Chicken, Inc. v. Diversified Packaging, Inc.,* 549 F.2d 368, 379 (5th Cir. 1977). The *Pick-Barth* jurisprudence reverses the order. The early cases apply a *per se* test, but the later cases resort to an approach which more closely resembles the rule of reason. Significantly, several of the most recent cases reject the *Pick-Barth per se* rule altogether. *Redwing Carriers v. Mc-*

Kenzie Tank Lines, Inc., 443 F.Supp. 639 (N.D. Fla. 1977) (notice of appeal filed Fifth Circuit, No. 78-1362); *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc.,* 430 F.Supp. 1234, 1241 (N.D. Iowa 1977); *Associated Radio Service Co. v. Page Airways,* 414 F. Supp. 1088, 1091-1094 (N.D. Tex. 1976) (notice of appeal from subsequent order filed Fifth Circuit, No. 78-1159); *Mar Food Corp. v. Doane,* 405 F.Supp. 730 (N.D. Ill. 1975) (McLaren, D. J.); *Southland Reship, Inc. v. Flegel,* 401 F.Supp. 339, 347 (N.D. Ga. 1975) (dictum); *see du Pont Walston, Inc. v. E. F. Hutton & Co.,* 368 F.Supp. 306 (S.D. Fla. 1973).

Scholarly analysis has also found little merit in the *Pick-Barth* doctrine. Yoerg, *Should a Trade Secrets Misappropriation Claim Lie in a Procrustean Antitrust Bed?,* 22 Antitrust Bull. 1 (1977); Boone, *Single-Corporation Competitive Torts and the Sherman Act,* 2 Ga.L.Rev. 372 (1968); Comment, *A Reexamination of Pick-Barth Per Se Illegality Under Section 1 of the Sherman Antitrust Act,* 38 U.Pitt.L.Rev. 87 (1976); Note, *Unfair Competition Under the Sherman Act,* 59 Iowa L.Rev. 1194 (1974); Note, *Acts of Unfair Competition with Intent to Injure a Competitor Held a Per Se Violation,* 42 Fordham L.Rev. 909 (1974).

Critics of *Pick-Barth* make several telling points. The first is that the definition of "unfair means" is so vague that the *Pick-Barth* cases fail to draw the bright line of illegality which is essential if a *per se* rule is to achieve its purpose as a guide to business planning. There is no federal law of unfair competition. *Pick-Barth* and *Perryton* rely on dictum concerning unfair competition in the pre *Erie* case, *Hitchman Coal & Coke Co. v.*

Mitchell, 245 U.S. 229, 259, 38 S.Ct. 65, 62 L.Ed. 260 (1917). The language may be contrary to the law of unfair competition as it is now understood in the states. *See* 45 Am.Jur.2d *Interference* § 46. Significantly, the plaintiff in this case cites no non-*Pick-Barth* cases, state or federal, that indicate the conduct of which he complains has been recognized as unfair competition, though offenses such as misappropriation of trade secrets and disparagement are generally recognized. *See Developments in the Law—Competitive Torts*, 77 Harv.L.Rev. 888 (1964). Even if we were to adopt the law of the forum state, the cases defining unfair competition are likely to be in noticeable disarray. In the words of one authority, "Progress in the development of guiding principles in the law of unfair competition is still 'a consummation devoutly to be wished.' " 1 R. Callmann, Unfair Competition, Trademarks & Monopolies, iii (3d ed. 1967). The Texas courts even conflict on whether a customer list is a trade secret. *See Mercer v. C. A. Roberts Co.*, 570 F.2d 1232, 1238-1239 (5th Cir. 1978) (no trade secret) (alternative holding).

[3] On a more fundamental level, the *Pick-Barth* doctrine fails to perceive that the purposes of antitrust law and unfair competition law generally conflict. The thrust of antitrust law is to prevent restraints on competition. Unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition. The law of unfair competition tends to protect a business in the monoply over the loyalty of its employees and its customer lists, while the general purpose of the antitrust laws is to promote competition by freeing from monoply a firm's sources of

labor and markets for its products. *See Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 891, 894 (5th Cir. 1954), *cert. denied*, 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715 (1955) (patent infringement is not an injury cognizable under the Sherman Act); Yoerg, *Missappropriation Claim*, 22 Antitrust Bull. at 33.

An instance where the result of antitrust law and unfair competition law enforcement may not conflict is when a firm with substantial market power, perhaps approaching that of a monoply, uses unfair competition to augment its position by eliminating a rival concern from the market. But it is the elimination of the competition, by fair means or foul, that is the concern of the antitrust law, and it is only the unfair method on which the law of unfair competition focuses.

The more modern courts examining the *Pick-Barth* rule have stated that it applies only when the defendant is a "significant existing competitor." *Southland Reship, Inc.*, 401 F.Supp. at 346-347; *see George R. Whitten, Jr., Inc.*, 508 F.2d at 562; *Tower Tire & Auto Center, Inc.*, 392 F.Supp. at 1108-1109. *But see Atlantic Heel Co.*, 284 F.2d at 881; *Metal Lubricants Co. v. Engineered Lubricants Co.*, 411 F.2d 426, 430 (8th Cir. 1969). While this requirement begins to limit *Pick-Barth* to Sherman Act proportions, it fails to do the job entirely.

The Sherman Act was conceived as a weapon against monopolies, trusts, and conspiracies which used agreement instead of financial consolidation to achieve the same results. The market power of the defendant charged with a *Pick-Barth* violation is crucial, for two reasons.

[4, 5] First, absent some market impact comparable to that which would be forbidden by the law of mergers, the interests protected by the antitrust laws never arise. *See, e.g., United States v. General Dynamics Corp.*, 415 U.S. 486, 494-498, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974). *See generally*, L. Sullivan, Antitrust § 204 (1977). If a defendant could achieve a desired result either by lawful merger or by engaging in unfair competition, the choice of the unfair competion route alone should not give rise to an antitrust violation.

[6] Second, only if the defendant can gain an increment of monoply through his unfair competition would the additional sanctions of the Sherman Act, including treble damages and criminal sanctions, be appropriately used to deter him. Single damages or equivalent injunctive relief is thought sufficient to compensate a firm for unfair competition. *Cf.* R. Posner, Economic Analysis of Law 28-29 (1973) (decrying remedies other than actual damages for breach of a restrictive covenant).

The "significant existing competitor" requirement misses the mark in several respects. By not aiming at market power, it omits a number of relevant considerations, including the defendant's market share before and after the unfair conduct, the number and relative size of firms in the market, the conditions of entry, the potential competition from firms outside the market, and whether a trend toward concentration exists. It also excludes cases in which a new entrant possesses such dramatic market power that his conduct, aimed at eliminating competition, threatens the values protected by the Sherman Act. *Cf. United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 93 S.Ct.. 1096, 35 L.Ed.2d 475 (1973) (certain market extension mergers illegal).

Cherokee Laboratories, Inc. was such a case. There one of the defendants, the plaintiff's supplier, had an exclusive dealing arrangement with the holder of a patent. The plaintiff was its only distributor. The supplier decided to begin its own distribution business. It hired away an employee of the plaintiff, raised prices to the plaintiff, and conspired to eliminate the plantiff from the market. The supplier established a 150 percent markup on its own distribution even though only 20 percent of the market was being served. The plaintiff had unsuccessfully attempted to distribute a rival and inferior product not furnished by the defendant supplier. The district court granted summary judgment for the defendants, and this Court reversed. We held the patent monopoly could not be extended past the first sale, that the high markup and the low service in the distribution market indicated a lack of competition there, and consequently the conspiracy established the "public injury," or injury to competition, necessary to establish a claim under Sherman Act § 1. *Cherokee Laboratories, Inc.* is an unusual case, because the defendant, although a new entrant in the distribution market, was a potential monopolist because of its control of supply.

We think the line drawn by the *Pick-Barth* doctrine is so vague, and the circumstances in which its application manifests any injury to competition so dependent on individual facts that it does not merit the *per se* characterization some of the early cases give it. Defendants should be permitted to argue that their competitive acts, fair or unfair, have not produced an impermissible degree of market power, and that their use of misappropriated business resources evinces an increase in competition, not a reduction. An instructive analogy lies in the

law of mergers, where the rule of reason also controls. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 321-322, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); E. Gelhorn, Antitrust Law & Economics 329-330 (1975).

[7, 8] One other consideration bolsters our conclusion. Congress has repeatedly declined to create a federal law of unfair competition. 1 R. Callmann, Unfair Competition, Trademarks & Monopolies 4.3 at 137-142 (3d ed. 1967) & 35 (Supp. 1976). The Federal Trade Commission has the power to correct "unfair or deceptive acts or practices," 15 U.S.C.A. § 45(a)(1), but the language of the Sherman Act does not give that power to private plaintiffs. Courts should be circumspect in adopting doctrines that have even the appearance of disturbing a congressional balance of remedies.

[9] We thus reject the *per se* rule of *Pick-Barth* and adopt a rule of reason to be applied on a case-by-case basis in situations where competitive forces protected by the Sherman Act suffer some palpable injury.

IV. *Anticompetitive Effect*

[10, 11] To prove an antitrust violation under the rule of reason, Northwest must show the defendants' conduct adversely affected competition. That showing is essential, because "[a]n anti-trust policy divorced from market considerations would lack any objective benchmarks." *Continental T. V., Inc.*, 433 U.S. at 53 n.21, 97 S.Ct. at 2560. *See Posner, The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U.Chi.L.Rev. 1 (1977). An evil intent alone is insufficient to establish a violation under the rule of

reason, although proof of intent may help a court assess the market impact of the defendants' conduct. *See Chicago Board of Trade*, 246 U.S. at 238, 38 S.Ct. 242.

The district court held that Northwest had shown only the substitution of one distributor for another, and so had failed to produce facts which would demonstrate anticompetitive effect upon the business of selling and servicing PAT equipment in the North Texas region. On that reading of the evidence, its legal conclusion was impeccably correct. *Burdett Sound, Inc.*, 515 F.2d at 1248; *Cherokee Laboratories, Inc.*, 383 F.2d at 104 (dictum); *Craig*, 515 F.2d at 224; *Ace Beer Distributors, Inc.*, 318 F.2d at 287.

The examination of this case, however, cannot stop without an inquiry into the market power of the defendants. *Burdett Sound, Inc.* indicated the evidence there showed "no effort by either [defendant] to establish market dominance," 515 F.2d at 1248. In *Cherokee Laboratories, Inc.* an anticompetitive effect was said to exist when the new distributor, if effective in driving out the old, would become a monopolist. *See also Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 469, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). Furthermore, this case, like *Cherokee Laboratories, Inc.*, entails interbrand as well as intrabrand competition.

Omark and Bosco conspicuously lack the kind of market power possessed by the defendants in *Cherokee Laboratories, Inc.* The plaintiff does not assert that they have patents that would make monopoly a possibility. In fact, Omark only has a 25 percent share of the national manufacturing market, and faces eight other

competitors, one of which is larger than Omark. Northwest has not shown that either Omark or Bosco earns an excessive profit on its business, or that the PAT market as a whole lacks full service.

From a structural perspective, the defendants' conduct *enhanced* rivalry, rather than reducing it. Where, for all practical purposes, only Northwest stood before, there are now two: Northwest and Bosco. Northwest argues that its fall in market share demonstrates an adverse effect on competition, but that argument mistakes competitors for competition. Certainly Northwest has been injured but the fall from grace of the number two firm which held a 20 percent market share, and its replacement by a new firm with an 11.5 percent share, reduces market concentration and increases the competitive possibilities. That would be true even if Northwest's two percent share were eliminated entirely. It is also significant that McLeroy Fasteners has stayed in the market and Omark, the supplier, remains a potential competitor.

Northwest suggests injury to competition because past Northwest customers who bought Omark tools cannot get adequate service from Bosco. That may represent nothing more than a temporary dislocation, because purchasers of PAT products will buy other brands if Bosco's poor service is significant. At worst, it represents bad business judgment by Omark. Given the competitive structure of the market, it cannot be taken as an indication that Omark has market power.

[12] Finally, Northwest asserts competitive injury because it was forced to raise its prices to compensate for overhead on its lower volume. Northwest's ability to raise its prices may indicate that *Northwest* possessed unusual market power in some fashion, but it cannot be taken as an indication that the *defendants* possessed such power, or that their conduct affected prices in the PAT market generally. *See Kestenbaum v. Falstaff Brewing Corp.*, ____F.2d____ (5th Cir. 1978) (No. 76-4290, slip opinion page 5087). Northwest has failed to show anticompetitive effect and so cannot establish an antitrust violation under the rule of reason.

AFFIRMED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-74-1104-D

NORTHWEST POWER PRODUCTS, INC.,
Plaintiff

v.

OMARK INDUSTRIES, INC., BOB WOOTEN AND
BOSCO FASTENING SERVICE CENTER,
Defendants

(Filed April 7, 1977)

ORDER

The motions for summary judgment filed by all defendants came on for consideration before the Honorable Robert M. Hill, United States District Judge. The court has considered the motions, the supporting and opposing briefs, and the oral argument of all counsel, and is of the opinion that the motions should be sustained.

The issue before this court has been distinctly defined. The facts are undisputed in that for the purposes of their motions for summary judgment the defendants have admitted all facts as alleged by plaintiff which are supported by the evidence. The plaintiff has alleged only anti-trust violations; no contract or tort theories are involved. Plaintiff's attorney represented to the court during oral argument that plaintiff's case is exclusively based on the theory that defendant Omark Industries, Inc.'s

(hereinafter "Omark") refusal to deal with plaintiff was part of a conspiracy by Omark and the other defendants to establish market dominance and drive out an existing competition, the plaintiff, Northwest Power Products, Inc., (hereinafter "Northwest").[1]

In support of its cause of action Northwest cites the decisions of *Albert Pick-Barth Co. v. Mitchell Woodbury Co.*, 57 F.2d 96 (1st Cir. 1932) and succeeding cases which hold that a conspiracy to eliminate a substantial, existing competition by unfair means constitutes an offense under Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1.[2] These cases are inapplicable to the facts shown in the instant case. In the cases cited by Northwest a fellow competitor, a manufacturer, or a supplier, had forced an existing competitor out of the total relevant market through unfair practices.

In the present case there is no substantial existing competitor. Northwest has attempted to fit the facts of its case into the proper mold by alleging that Omark sold its products directly to the public in competition with Northwest from a time shortly after Northwest

1. During oral argument, Northwest's attorney alluded to charges of price fixing, violations of the "Schwinn doctrine," and other violations which he felt were in the case but which he had not "considered significant enough to mention" to the court in either Northwest's Complaint or its brief opposing defendants' motions for summary judgment. Since Northwest has not squarely presented these charges to the court, the court has given Northwest's additional allegations only a cursory review. However, it is the court's opinion that none of these alleged anti-trust violations are present in the facts of this case.

2. Originally Northwest charged violations of both 15 U.S.C. 1 and 2; however, as has been stated above Northwest has dropped all charges other than its claim of an anti-competitive conspiracy, a violation of 15 U.S.C. 1.

became Omark's distributor until Northwest's termination. However, Northwest has produced no evidence to support this allegation and has made no attempt to refute the statement of Omark's counsel made during oral argument that although it was true that Omark had employed a salesman to sell Omark products directly to the public early in Omark's relationship with Northwest, this practice was discontinued sometime prior to Omark terminating Northwest as its distributor. As to defendant Bosco Fastening Service Center, Inc., (hereinafter "Bosco") prior to the time Bosco became Omark's distributor, Northwest admits Bosco was not a direct competitor with it in the P.A.T. products line. (Ronald R. Gibbs Affidavit; Plaintiff's Brief in Opposition to Defendants' Motions for Summary Judgment, pp. 20-21).

Northwest has not been excluded from the total relevant market. In the facts as alleged by Northwest, Northwest has only been eliminated from the limited market of Omark brand P.A.T. equipment, not the total market of P.A.T. tools and supplies. Northwest is free to trade in and is in fact selling and supplying tools and equipment competitive with those manufactured by Omark. (Plaintiff's Brief in Opposition to Defendants' Motions for Summary Judgment, p. 10).

In the court's opinion the facts of the present case involve nothing more than an exchange of distributors, and a conspiracy to terminate a distributorship, even if key personnel are lured from a former distributor to a newly established distributor, is not an antitrust violation. *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975); *Perryton Wholesale, Inc. v. Pioneer Distributing Co. of Kansas*, 353 F.2d 618 (10th Cir. 1965);

Roth Office Equipment Co. v. G F Business Equipment Co., 1975—2 Trade Reg. Rep. ¶ 60,563 (E.D. Ohio 1975). Northwest may have a contract or tort cause of action, but it has established no facts no support an antitrust claim that the loss of its Omark distributorship will have an anti-competitive effect upon the business of selling and servicing P.A.T. equipment in the North Texas region.

Accordingly, it is ORDERED that the defendants' motions for summary judgment are sustained and this cause is dismissed.

Dated this 7th day of April, 1977.

/s/ ROBERT M. HILL
United States District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-74-1104-D

NORTHWEST POWER PRODUCTS, INC.

v.

OMARK INDUSTRIES, INC.,
BOB WOOTEN and
BOSCO FASTENING SERVICE CENTER, INC.

(December 19, 1977)

JUDGMENT

This action came on for hearing before the Court, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that the Defendants' motions for summary judgment be, and they are hereby, sustained, and this cause is dismissed.

ORDERED entered the 7th day of April, 1977, this 19th day of December, 1977.

/s/ ROBERT M. HILL
United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1976

NORTHWEST POWER PRODUCTS, INC.,
Plaintiff-Appellant,

v.

OMARK INDUSTRIES, INC., BOB WOOTEN,
and BOSCO FASTENING SERVICE CENTER, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 7/10/78, 5 Cir., 197__, ____F.2d____).

(August 24, 1978)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY
United States Circuit Judge